Dato' Annas bin Khatib Jaafar v Sharifuddin Mohamed & Ors

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7–23–55 OF 2007
SU GEOK YIAM J
31 OCTOBER 2014

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Tort — Defamation — Libel — Article published in newspaper — Whether words complained of referred and were understood to refer to plaintiff — Whether words complained of published — Whether words complained of were defamatory of plaintiff — Whether article actuated by malice — Defence of qualified privilege — Whether could be relied on — Whether plaintiff entitled to claim aggravated and/or exemplary damages

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This action was brought by the plaintiff against the defendants for damages for libel that was allegedly written, printed and published or caused to be written, printed and published of the plaintiff by the defendants. The plaintiff was the Director-General ('DG') of Lembaga Kemajuan Ikan Malaysia ('LKIM'). The first defendant was the Chief Editor of the *Harian Metro*. The second defendant was the printer and publisher of the *Harian Metro*. The third defendant was the Chairman of LKIM. As the Chairman of LKIM, the third defendant was also the Chairman of Majuikan Sdn Bhd ('Majuikan'), a subsidiary of LKIM. An article captioned 'Siasat kontrak LKIM Lembaga Pengarah lapor kepada BPR' was published in the *Harian Metro* ('the impugned article'). The impugned article allegedly highlighted wrong doings of the plaintiff in his capacity as the DG of LKIM. The plaintiff claimed that the third defendant, actuated by malice, had lodged a false report against him knowing that the contents of the Anti-Corruption Agency ('ACA') report were wholly false. The plaintiff further claimed that the third defendant libelled him by disclosing and handing over a copy of his false report to one Wan Hazmir bin Bakar, the senior reporter, of the second defendant, and thereby, declassifying the contents of the report. The plaintiff claimed that the first and second defendants have maliciously libelled him by writing, printing and publishing the impugned article based on the false report of the third defendant without ascertaining the truth of its contents and with reckless disregard for their truth or fairness and with the dominant motive of presenting the readers of *Harian Metro* with lurid and sensational allegations of mismanagement of government funds. The issues for the court's determination were, inter alia, whether the words complained of referred and were understood to refer to the plaintiff; whether the words complained of have been published by the defendants; whether the words complained of were defamatory of the plaintiff; whether the first and second defendants could rely on the defences of

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qualified privilege; and whether the plaintiff was entitled to claim aggravated and/or exemplary damages?

Held, allowing the claim:

(1) The third defendant's report to the ACA was not an absolutely privileged document. The third defendant's report was copied to four individuals. Hence, the third defendant has deliberately opted to publish the contents of his report to third parties rather than to confine or restrict them to the ACA. By doing that, the third defendant's report had lost the status of an absolutely privileged document which it would have otherwise enjoyed. After having lodged the report to the ACA, the third defendant has also opted to show and to give a copy of his report to a third party who is totally unconnected with the carrying out of the necessary investigations into his report namely the second defendant's senior news reporter. It was manifestly clear that the third defendant's report was not an absolutely privileged document (see paras 92–94, 96 & 98).

(2) The irresistible conclusion arrived at by the court was that the article referred to and was understood to refer to the plaintiff as the DG of LKIM and as the Head of the management of LKIM and in that capacity, in the eyes of the public, he was responsible for the awarding of the contracts. The words complained of when read as a whole and in its context in the impugned article conveyed a defamatory meaning. The words such as 'pemberian kontrak dan kerja-kerja pembinaan Kompleks LKIM bernilai RM55 juta membuatkan Lembaga Pengarah pertubuhan itu sendiri mengemukakan laporan kepada Badan Pencegah Rasuah' were words which imputed to the plaintiff the commission of the crime of bribery and corruption for which he could be made to suffer 'corporally by way of punishment' (see paras 162 & 191).

(3) The defendants failed in proving their defences of qualified privilege. To gain protection, the statement must be fairly warranted by the occasion. It must be reasonably necessary for the performance of the duty or the protection of the interest which underlies the privilege. The public had no interest in matters reported to the ACA unless the reports have been duly investigated and the culprits duly charged in the courts. In all cases in which the defendant relied on a plea of qualified privilege, whether on ground of duty or of interest, such duty or interest must exist in fact. The evidence from the third defendant and the first and second defendants and their witnesses were enough to show that such a duty or corresponding interest or vice versa did not exist. Hence, they have failed to prove their defences of qualified privilege and fair comment on matters of public interest (see paras 406, 408 & 418–420).

(4) The court granted to the plaintiff judgment on liability for damages for libel against the three defendants and the court awarded to the plaintiff a

sum of RM30,000 as general damages for libel and a sum of RM40,000 as costs against the first and second defendants and a sum of RM10,000 as general damages for libel and a sum of RM30,000 as costs against the third defendant (see para 517).

[Bahasa Malaysia summary

Tindakan ini dimulakan oleh plaintif terhadap defendan-defendan bagi ganti rugi fitnah yang didakwa ditulis, dicetak dan diterbitkan atau disebabkan untuk ditulis, dicetak dan diterbitkan mengenai plaintif oleh defendan-defendan. Plaintif ialah Ketua Pengarah Lembaga Kemajuan Ikan Malaysia ('LKIM'). Defendan pertama ialah Ketua Pengarah *Harian Metro*. Defendan kedua ialah pencetak dan penerbit *Harian Metro*. Defendan ketiga merupakan Pengerusi LKIM. Sebagai Pengerusi LKIM, defendan ketiga juga merupakan Pengerusi Majuikan Sdn Bhd ('Majuikan'), anak syarikat LKIM. Satu artikel bertajuk 'Siasat kontrak LKIM Lembaga Pengarah lapor kepada BPR' diterbitkan dalam *Harian Metro* ('artikel yang dipertikaikan'). Artikel yang dipertikaikan tersebut didakwa menggariskan kesalahan-kesalahan plaintif dalam kapasiti beliau sebagai ketua pengarah LKIM. Plaintif mendakwa bahawa defendan ketiga, didorong oleh niat jahat, telah membuat laporan salah mengenainya walaupun tahu bahawa kandungan laporan Badan Pencegah Rasuah ('BPR') adalah salah. Plaintif seterusnya mendakwa bahawa defendan ketiga memfitnah terhadapnya dengan mendedahkan dan menyerahkan sesalinan laporan yang salah kepada Wan Hazmir bin Bakar, wartawan kanan defendan kedua dan dengan itu, mengubah status kandungan laporan. Plaintif mendakwa bahawa defendan pertama dan kedua telah dengan memfitnahnya dengan niat jahat iaitu dengan menulis, mencetak dan menerbitkan artikel yang dipertikaikan berdasarkan laporan salah oleh defendan ketiga tanpa memastikan kebenaran kandungannya dan dengan cuai mengabaikan kebenaran atau keadilan dan dengan motif utama memberikan pembaca *Harian Metro* dakwaan-dakwaan sensasi dan menggemparkan mengenai salah guna dana kerajaan. Isu-isu untuk diputuskan oleh mahkamah adalah, antara lain, sama ada perkataan yang menjadi aduan telah diterbitkan oleh defendan-defendan; sama ada perkataan-perkataan yang diadukan memfitnah plaintif; sama ada defendan pertama dan kedua boleh bergatung pada pembelaan perlindungan bersyarat; dan sama ada plaintif berhak menuntut ganti rugi teruk dan/atau teladan.

Diputuskan, membenarkan tuntutan:

(1) Laporan defendan ketiga kepada BPR bukanlah satu dokumen perlindungan mutlak. Laporan defendan ketiga telah disalin kepada empat individu lain. Oleh itu, defendan ketiga sengaja memilih untuk menyiarkan kandungan laporannya kepada pihak ketiga dan bukannya untuk menyekat atau mengehadkannya kepada BPR sahaja. Dengan berbuat demikian, laporan defendan ketiga kehilangan status dokumen

perlindungan bersyarat yang sepatutnya dinikmati. Setelah membuat laporan kepada BPR, defendan ketiga juga memilih untuk memaparkan dan memberi sesalinan laporan kepada pihak ketiga yang sama sekali tidak berkaitan dalam penjalanan siasatan yang perlu dalam laporannya iaitu wartawan berita utama defendan kedua. Amat jelas bahawa laporan defendan ketiga bukan satu dokumen perlindungan mutlak (lihat perenggan 92–94, 96 & 98).

(2) Kesimpulan yang dicapai oleh mahkamah adalah bahawa artikel merujuk pada dan difahami merujuk pada plaintif sebagai Ketua Pengarah LKIM dan sebagai Ketua Pengurusan LKIM dan dalam kapasiti tersebut, di mata orang ramai, beliau bertanggungjawab dalam pemberian kontrak. Perkataan-perkataan yang diadukan apabila dibaca secara keseluruhan dan dalam konteks artikel yang dipertikaikan membawa maksud fitnah. Perkataan 'pemberian kontrak dan kerja-kerja pembinaan Kompleks LKIM bernilai RM55 juta membuatkan Lembaga Pengarah pertubuhan itu sendiri mengemukakan laporan kepada Badan Pencegah Rasuah' adalah perkataan-perkataan yang mengaitkan plaintif dengan pelakuan jenayah suapan dan rasuah yang mana beliau boleh dihukum 'corporally by way of punishment' (lihat perenggan 162 & 191).

(3) Defendan gagal membuktikan pembelaan perlindungan bersyarat mereka. Untuk mendapatkan perlindungan, kenyataan mestilah dibenarkan oleh keadaan. Ia semestinya munasabah bagi pelaksanaan kewajipan atau perlindungan faedah yang mendasari keistimewaan tersebut. Orang ramai tidak mempunyai kepentingan dalam perkara yang dilaporkan kepada BPR melainkan jika laporan telah disiasat dengan sewajarnya dan pesalah hukuman sewajarnya di mahkamah. Dalam semua kes-kes yang dijadikan sandaran oleh defendan mengenai pli perlindungan bersyarat, sama ada atas alasan kewajipan atau kepentingan, kewajipan atau kepentingan itu mesti wujud dalam fakta. Keterangan defendan ketiga dan defendan pertama dan kedua dan saksi-saksi mereka cukup menunjukkan bahawa apa-apa kewajipan atau kepentingannya atau juga sebaliknya tidak wujud. Oleh itu, mereka gagal untuk membuktikan pembelaan perlindungan bersyarat mereka dan komen adil mengenai perkara-perkara yang mempunyai kepentingan awam (lihat perenggan 406, 408 & 418–420).

(4) Mahkamah memberikan penghakiman kepada plaintif tentang liabiliti bagi ganti rugi untuk fitnah terhadap ketiga-tiga defendan dan mahkamah memberikan kepada plaintif RM30,000 sebagai ganti rugi am bagi fitnah dan RM40,000 sebagai kos terhadap defendan pertama dan kedua sebanyak RM10,000 sebagai ganti rugi am bagi fitnah dan sebanyak RM30,000 sebagai kos terhadap defendan ketiga (lihat perenggan 517).]

Notes

For cases on libel, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 575–793.

Cases referred to

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Abdul Manaf bin Ahmad v Mohd Kamil Datuk Haji Mohd Kassim [2011] 4 MLJ 346; [2009] 2 CLJ 121, CA (refd)
Adam v Ward [1917] AC 309, HL (refd)
Belt v Lawes (1882) 51 LJQB 359 (refd)
Casell & Co Ltd v Broome and another [1972] AC 1027, HL (refd)
Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (refd)
Clarence Wilfred v Tengku Adnan Tengku Mahmud & Anor [1983] CLJ (Rep) 518, HC (consd)
Clark v Molyneux (1877) 3 QBD 237, CA (refd)
Dato' Annas bin Khatib Jaafar v Datuk Manja Ismail & Ors [2011] 8 MLJ 747, HC (refd)
Dato' Annas bin Khatib Jaafar v The New Straits Times Press (M) Bhd & Ors [2013] 10 MLJ 640; [2013] 4 CLJ 96, HC (refd)
Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492; [2010] 5 CLJ 301, HC (refd)
Daucey v Holloway [1901] 2 KB 441, CA (refd)
David Syme & Co and Another v Canavan (1918) 25 CLR 234, HC (refd)
E Hulton & Co v Jones [1910] AC 20, HL (refd)
Egger v Viscount Chelmsford and others [1965] 1 QB 248, CA (distd)
English and Scottish Co-Operative Properties Mortage and Investment Society, Limited v Odhams Press, Limited [1940] 1 KB 440, CA (refd)
Flood v Times Newspapers Ltd [2012] 2 AC 273, SC (refd)
Fysh v Thorowgood (1598) Cro Eliz 623 (refd)
Gathercole v Miall (1846) 15 M & W 319 (refd)
Godman v Times Publishing Company, Limited [1926] 2 KB 273, CA (refd)
Halim bin Arsyat v Sistem Televisyen Malaysia Bhd & Ors [2001] 6 MLJ 353, HC (distd)
Heap v Green [1926] NZLR 302, HC (refd)
Hellwig v Mitchell [1910] 1 KB 609, KBD (refd)
Irene Fernandez v Utusan Melayu (M) Sdn Bhd & Anor [2008] 2 CLJ 814, HC (refd)
John v MGN Ltd [1996] 3 WLR 593, CA (refd)
Johns v Gittings (1591) Cro Eliz 239 (refd)
Jones v E Hulton & Co [1909] 2 KB 444, CA (refd)
Kelly v O'Malley (1889) 6 TLR 62, QBD (folld)
Kelly v Sherlock (1866) LR 1 QB 686, QBD (refd)
Knupffer v London Express Newspaper, Limited [1944] AC 116, HL (distd)

Le Mercier's Fine Finishings Pte Ltd & Anor v Italcomm (Malaysia) Sdn Bhd [1996] MLJU 365; [1996] 3 CLJ 590, HC (refd)
Lee Kuan Yew v Derek Gwyn Davies & Ors [1990] 1 MLJ 390; [1990] 1 CLJ 583; [1990] 3 CLJ Rep 691, HC (refd)
Lee Yoke Yam v Chin Keat Seng [2013] 1 MLJ 145; [2012] 9 CLJ 833, FC (refd)
Lim Guan Eng v PP [2000] 2 MLJ 577, FC (refd)
Mark Ignatius Uttley @ Mark Ostyn v Wong Kam Hor & Anor [2002] 4 MLJ 371; [2002] 8 CLJ 628, HC (refd)
Marks and Another v Wilson-Boyd and Others [1939] 2 All ER 605, CA (refd)
Marks v Samuel [1904] 2 KB 287, CA (refd)
May v Brown (1824) 3 B & C 113 (refd)
McDonald's Corp and another v Steel and another [1995] 3 All ER 615, CA (refd)
Microsoft Corporation & Ors v SM Summit Holdings Ltd & Anor and other appeals [1999] 4 SLR 529, CA (refd)
Ormiston v Great Western Railway Company [1917] 1 KB 598, KBD (refd)
Peters v Bradlaugh (1888) 4 TLR 414, QBD (refd)
Polly Peck (Holdings) Plc and others v Trelford and others [1986] 2 WLR 845; [1986] QB 1000, CA (refd)
Praed v Graham (1889) 24 QBD 53, CA (refd)
Purdy v Stacey (1771) 5 Burr 2698 (refd)
Rassam v Budge [1893] 1 QB 571 (refd)
Ratcliffe v Evans [1892] 2 QB 524, CA (refd)
Reynolds v Times Newspapers Ltd and others [2001] 2 AC 127, HL (distd)
Robert v Jones [1891] 2 QB 194, QBD (refd)
Rookes v Barnard and others [1964] AC 1129, HL (refd)
Sadgrove v Hole [1901] 2 KB 1, CA (refd)
Scherer and Another v Counting Instruments Ltd and Another [1986] 1 WLR 615, CA (refd)
Scott v Sampson (1882) 8 QBD 491 (refd)
Shapiro v La Morta [1923] All ER Rep 378, CA (refd)
Simpson v Robinson (1848) 12 QB 511 (refd)
Sir W De Crespigny v Wellesley (1829) 5 Bing 392 (refd)
Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd [2010] 9 MLJ 320; [2010] 7 CLJ 885, HC (distd)
Smith v Streatfeild and others [1913] 3 KB 764, KBD (refd)
Syed Husin Ali v Sharikat Pencetakan Utusan Melayu Bhd & Anor [1973] 2 MLJ 56 (refd)
Tan Sri Dato' Seri Musa bin Dato' Hj Hassan v Dato' Seri Anwar Ibrahim [2010] MLJU 934; [2010] 8 CLJ 239, HC (consd)
Taylor and others v Serious Fraud Office and others [1998] 4 All ER 801, HL (refd)
Thomas v Bradbury, Agnew & Co, Limited, and another [1906] 2 KB 627, CA (refd)
Toogood v Spyring (1834) 1 Cr M & R 181 (refd)

Tony Pua Kiam Wee v Syarikat Bekalan Air Selangor Sdn Bhd (unreported), CA (distd)
Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd)
Utusan Melayu (Malaysia) Bhd & 3 Ors v Tjanting Handicraft Sdn Bhd & Anor [2005] 1 AMR 624, HC (refd)
Vines, Gent v Serell (1835) 7 Car & P 163 (refd)
Webb v Beavan (1883) 11 QBD 609 (refd)
Wernher, Beit & Co v Markham (1901) 18 TLR 143 (refd)
William Derry, JC Wakefield, MM Moore, J Pethick and SJ Wilde v Sir Henry William Peek, Baronet (1889) 14 App Cas 337, HL (refd)
Wong Yoke Kong & Ors v Azmi M Anshar & Ors [2003] 4 MLJ 96, HC (folld)
Zierenberg and Wife v Labouchere [1893] 2 QB 183, CA (refd)

Legislation referred to

Anti-Corruption Act 1997 (repealed by Malaysian Anti-Corruption Commission Act 2009) ss 10, 12(1)
Criminal Procedure Code ss 107, 112
Defamation Act 1957 ss 8, 9
Federal Constitution art 10
Law of Libel Amendment Act 1888 [UK]
Lembaga Kemajuan Ikan Malaysia Act 1971
National Land Code Form 14A
Penal Code
Printing Presses and Publications Act 1984 s 8A(2)
Rules of Court 2012 O 59, O 59 rr 3, 3(1), 3(2), 16, 16(1), 19, 19(1), 19(2)

Shamsul Bahrain bin Ibrahim (Bahrain) for the plaintiff.
Rueben Mathiavaranam (Reuben Williams) for the first and second defendants.
Harikrishnan (M Mahendra & Co) for the third defendant.

Su Geok Yiam J:

THE PLAINTIFF'S SUIT

[1] This is an action brought by the plaintiff against the defendants for damages for libel that was allegedly written, printed and published or caused to be written, printed and published of the plaintiff by the defendants.

[2] The plaintiff was, at all material times, the Director-General ('DG') of a government linked company ('GLC'), namely, the 'Malaysian Fisheries Development Board' in English or 'Lembaga Kemajuan Ikan Malaysia' in Malay, known by its acronym 'LKIM'.

[3] LKIM was incorporated by Parliament under the Lembaga Kemajuan Ikan Malaysia Act 1971 ('the Act') with its address at 7th Floor, Wisma PKNS, Jalan Raja Laut, 50784 Kuala Lumpur.

[4] The first defendant was, at all material times, the chief editor of the *Harian Metro*, a daily national newspaper, with a very substantial circulation and readership throughout the jurisdiction of the court.

[5] The second defendant, namely, The New Straits Times Press (M) Bhd, was, at all material times, and still is the printer and publisher of the *Harian Metro.*

[6] The third defendant, namely, Adam Abdul Hamid, was, at all material times, the Chairman of LKIM. He was a political appointee to that post, having been appointed by Dato' Seri Abdullah Badawi, the then Right Honourable Prime Minister of Malaysia.

[7] Before he was appointed the Chairman of LKIM in 2004, the third defendant had worked as a newspaper reporter. He was also a former politician. He had served as a State Assemblyman for Johor and an Executive Council Member in charge of public works and civil amenities in the State Government of Johor.

[8] The third defendant's main duty as the Chairman of LKIM was to chair the meetings of the Board of Directors of LKIM ('the board'). His job, however, was not a full time job.

[9] As the Chairman of LKIM, the third defendant was also, at all material times, the Chairman of Majuikan Sdn Bhd ('Majuikan'). Majuikan is a wholly owned subsidiary of LKIM.

[10] Whenever irregularities arose in Majuikan, the irregularities would be reported to LKIM and the board would hear these irregularities. However, before the irregularities were discussed by the board, the third defendant was required to vacate the chair much to the chagrin of the third defendant.

[11] Matters came to a head when the other members of the Board of Directors of Majuikan discovered that their signatures had been forged to secure the authorisation by way of a resolution of the Board of Directors of Majuikan dated 14 February 2006 for the execution of a corporate guarantee ie guarantee per aval and side letter in the sum of Euro 10m ('the corporate guarantee'). The corporate guarantee was purportedly signed by the third defendant and the other Directors of Majuikan and was purportedly granted

by the Board of Directors of Majuikan in favour of a company, namely, Malaysia Sea Best Sdn Bhd ('MSB') in order to enable it to obtain an offshore loan from the Hongkong and Shanghai Banking Corp in the United States ('the bank') through Barclays Bank of Singapore.

[12] MSB had been awarded a contract by Majuikan to supply fish to the supermarkets. When MSB defaulted on the offshore loan, the bank recalled the loan by issuing a letter of demand (Bundle 'I', pp 128–130). The bank also claimed repayment of the offshore loan from Majuikan based on the corporate guarantee issued by Majuikan.

[13] The matter came into the open when Bank Negara Malaysia ('BNM') gave notice of the registration of the corporate guarantee.

[14] Encik Mohd Nor bin Hassan, the Chief Executive Officer of Majuikan, then lodged a police report on 7 July 2006 alleging that his signature and the signatures of the other Directors of Majuikan on the resolution of the Board of Directors of Majuikan and the corporate guarantee had been forged ('the police report') in order to resist the claim by the bank (Bundle I pp 134–140; 'ID22'). He alleged that the corporate guarantee was ultra vires and fraudulent as it was given without the knowledge of the management. This was reported in the press in April 2007.

[15] The third defendant being the Chairman of Majuikan at the material time was answerable to the board of LKIM for the irregularities concerning the issue of the corporate guarantee containing the alleged forged signatures of the other Directors of the Board of Majuikan.

[16] The plaintiff claimed that an article captioned 'Siasat kontrak LKIM Lembaga Pengarah lapor kepada BPR' in Malay or 'Investigate LKIM contract Board of Directors report to ACA' that was published in the *Harian Metro* dated 10 April 2007 ('the impugned article') and which contains the words complained of is defamatory of and concerning the plaintiff even though the plaintiff's name is not mentioned anywhere therein.

[17] The impugned article was written by one Kamarulzaman Pid who is the second defendant's Putrajaya Bureau Chief for the *Harian Metro*. The impugned article contained the words complained of on the alleged wrong doings of the plaintiff in his capacity as the DG of LKIM. He is a journalist of eleven years experience. He reports on, inter alia, current news and matters of public interest.

[18] The plaintiff claimed that the third defendant, actuated by malice, had lodged a false report against him knowing that the contents of his report were

wholly false with the intention to obstruct the Malaysian Administrative and Diplomatic Service ('MADS') from extending his tenure as the DG of LKIM, post his retirement, on a contractual basis.

[19] The plaintiff claimed that the third defendant has libelled him by disclosing and handing over a copy of his false report to Wan Hazmir bin Bakar, the senior reporter, of the second defendant, and thereby, declassifying the contents of the report.

[20] The plaintiff claimed that the first and second defendants have maliciously libelled him by writing, printing and publishing the impugned article based on the false report of the third defendant without ascertaining the truth of its contents and with reckless disregard for their truth or fairness and with the dominant motive of presenting the readers of *Harian Metro* with lurid and sensational allegations of mismanagement of government funds leading to wastage of government funds, of improper and corrupt practices and of abuse of power by a career administrator in the MADS ie the plaintiff.

RELIEFS CLAIMED BY THE PLAINTIFF IN HIS STATEMENT OF CLAIM

[21] The plaintiff is claiming the following reliefs from the court against the defendants and each of them as set out in para 13 of the plaintiff's statement of claim ('SOC'):

(1) General damages, for libel;

(2) Damages under the heading: words in their natural and ordinary meaning, for libel;

(3) Damages under the heading: the words used in a defamatory sense other than their ordinary meaning – innuendo, for libel;

(4) Damages including compensatory damages, aggravated and exemplary damages; for libel;

(5) An interlocutory injunction to restrain the defendants by themselves, their agents or servants or otherwise howsoever from further publishing the said misstatements reflecting adversely on the plaintiff's career in the Administrative and Diplomatic Service;

(6) An interlocutory injunction to restrain the defendants whether by itself, its directors, its agents or servants or otherwise howsoever and the second, third and fourth defendants [there is a clearly an error here because the plaintiff has named only three defendants in the Writ of Summons and Statement of Claim] whether by themselves, their agents or servants or otherwise howsoever from writing, publishing and printing or causing to be written, published and printed the words to the same or any similar effect defamatory of the plaintiff;

(7) Costs; and

(8) Further or other relief.

BACKGROUND AND FACTS

[22] In 1975, the plaintiff graduated from the University of Malaya with a Bachelor of Economics (Hons) degree which qualified him to be appointed as a career administrator in the MADS.

[23] In August 1975, the plaintiff joined the MADS as a career administrator when he was first appointed as an Assistant Secretary in the Manpower Planning Unit in the Prime Minister's Department.

[24] The plaintiff also obtained a Master of Science Degree in Agriculture Economics from the State University of Gent in Belgium after completing a two years course. This was followed by his attendance at various courses including fiscal courses relating to taxation, public revenue and finance in Japan.

[25] After his initial posting as an Assistant Secretary in the Manpower Planning Unit in the Prime Minister's Department, the plaintiff was appointed to the following positions in the course of his career in the MADS:

(a) Assistant Secretary, Planning Division of the Ministry of Primary Industries;

(b) Principal Assistant Secretary, Ministry of Primary Industries;

(c) Officer-in-Charge of Rubber Industry, Ministry of Primary Industries;

(d) Principal Assistant Secretary, Budget Division, Ministry of Finance;

(e) Principal Assistant Secretary, Privatisation Unit, Finance Division of the Ministry of Finance;

(f) Head of Cultivation Section, Commodity Division, Ministry of Agriculture;

(g) District Officer cum Land Administrator of Raub, Pahang;

(h) Division Secretary, Cultivation, Breeding and Industrial Division, Ministry of Agriculture and Agro-based Industry; and

(i) on 27 October 2004, the plaintiff was appointed as the DG of LKIM.

[26] On 23 April 2007, which was prior to the publication of the impugned article by the second defendant on 10 April 2007, the plaintiff was due to retire from the MADS. The plaintiff was hopeful of being re-appointed to his current

position ie as the DG of LKIM, on a contract basis because it was the normal practice adopted by the Government of Malaysia for his predecessors.

[27] According to the plaintiff, the third defendant was politicising the issue concerning the appointment of the DG of LKIM because the third defendant did not want the DG of LKIM to be appointed from the MADS. The third defendant also did not want the plaintiff to be reappointed as the DG of LKIM on a contract basis. What the third defendant wanted was for the Deputy DG of LKIM, namely, Dato' Mustafa bin Ahmad, a home grown officer from LKIM itself, who was not from the MADS, to be appointed as the new DG of LKIM to succeed the plaintiff upon the plaintiff's retirement on 23 April 2007.

[28] In retaliation for the police report which was lodged by the other directors of Majuikan against the alleged forgeries of their signatures and in order to create a smoke screen to divert the attention of the public and the authorities from investigating that police report, the third defendant devised a scheme for the speedy removal of the plaintiff, a career officer from the MADS, from his position as the DG of LKIM, in order to make way for the simultaneous appointment of the Deputy DG of LKIM as the new DG of LKIM.

[29] In furtherance of his scheme, the third defendant then lodged a report against the plaintiff with the 'Anti-Corruption Agency' ('ACA') in English or 'Badan Pencegah Rasuah' ('BPR') in Malay by way of a letter dated 6 February 2007 ('the report'). The report was captioned 'MISAPPROPRIATION OF FUNDS AND ABUSE OF POWER DIRECT NEGOTIATION 1/2006 CONSTRUCTION AND COMPLETION OF ACCESS ROAD TO LKIM (NEW) COMPLEX AT KUALA KEDAH'.

[30] The third defendant also extended a copy of his report to four named persons.

[31] They are as follows:

(a) Dato' Seri Haji Abdullah Ahmad Badawi, the then Right Honourable Prime Minister of Malaysia;

(b) Tan Sri Mohd Sidek bin Hj Hassan, the then Chief Secretary to the Government;

(c) Dato' Dr Zulkifli bin Idris, the then Chief Secretary to the Ministry of Agriculture and Agro-based Industry; and

(d) YB Dato' Shahril bin A Samad, the then Chairman of the Public Accounts Committee of Malaysia.

[32] Throughout the months of February and March of 2007, the third defendant waited for the outcome of the investigation which he had expected the ACA to carry out based on the report.

[33] Come April 2007, the announcement of the plaintiff's extension of service in a run up to his retirement was imminent. Since there was no development adverse to the plaintiff stemming from the report lodged by him, the third defendant then approached the New Straits Times Group of newspapers with a copy of the report. The third defendant was attended to by a senior reporter, namely, Wan Hazmir bin Bakar. The third defendant proceeded to disclose the contents of the report to Wan Hazmir bin Bakar.

[34] On 10 April 2007, the impugned article was published by the second defendant in three of its newspapers, namely, *The News Straits Times*, the *Berita Harian* and the *Harian Metro*.

[35] On 19 April 2007, the plaintiff's solicitors wrote to each of the defendants a letter to demand a retraction of the words complained of in the impugned article and an apology in order to vindicate the plaintiff's character. The letter also put the defendants on notice that if they should fail to abide by the plaintiff's demand, the plaintiff would commence legal proceedings against each of them for defamation.

[36] On 20 May 2007, another of the second defendant's newspapers, namely, the *Berita Minggu* published two press statements ('P6') concerning the private feud between the third defendant and the plaintiff which had led to the lodging of the report by the third defendant against the plaintiff and the publication of the words complained of in the impugned article in the second defendant's newspaper ie the *Harian Metro*.

[37] One of them was made the day before ie 19 May 2007, by the then Prime Minister, the Right Honourable Dato' Seri Haji Abdullah Badawi. The other was also made the day before ie 19 May 2007, by the then Minister for Agriculture and Agro-based Industry, the Honourable Tan Sri Muhyddin Mohd Yassin.

[38] In his press statement, the Prime Minister admonished the originator of the articles and demanded that the internal feud which had stemmed from domestic and personal differences between him and the plaintiff be stopped immediately.

[39] In his press statement, the Minister for Agriculture and Agro-based Industry added that an audit committee appointed by the Ministry concluded

that there were no wrong-doings in the awarding of contracts for the construction of a complex for LKIM at Kampong Geluncur in Kuala Kedah.

[40] Despite the Prime Minister's admonition and the ministerial denial, there was no substantive response to the plaintiff's letters much less an apology from the defendants.

[41] Hence, on 8 August 2007, the plaintiff filed this action against the three defendants vide his writ of summons ('writ'), encl 1, and his SOC, encl 1A.

THE FIRST AND SECOND DEFENDANTS' MEMORANDUM OF APPEARANCE AND STATEMENT OF DEFENCE

[42] On 17 September 2007, the first and second defendants filed their memorandum of appearance, encl 3.

[43] On 24 October 2007, the first and second defendants filed their statement of defence ('defence'), encl 6.

[44] The first and second defendants have relied on the defences of fair comment and qualified privilege. The first and second defendants pleaded that the impugned article concerned matters of current concern. The first and second defendants also pleaded that the impugned article was published on a privilege occasion.

[45] In para 6 of their defence, the first and second defendants denied that the words complained of in the impugned article referred to or were understood to refer to the plaintiff. They also pleaded that the contents of the impugned article were not concerned with the plaintiff but dealt exclusively with wider issues of public interest.

[46] In the same paragraph, they have also pleaded that the impugned article never alleged that the plaintiff or the management of LKIM were guilty but reported merely on the fact that LKIM, through its chairman, the third defendant, had lodged a report with the ACA calling for an investigation into the award of the contract for construction which was allegedly questionable, did not comply with contract award procedures, a reckless use and wastage of government funds and thus giving rise to suspicion. Having pleaded the summary of the imputations in the report in para 6 of their defence, they concluded that the tone of the article was measured and responsible.

[47] In para 7 of their defence, they denied that the words complained of meant or were understood to mean or were capable of bearing the meanings pleaded by the plaintiff in his SOC.

[48] In sub-para 9.3 of their defence, they pleaded that the conduct of the management of LKIM, which consists of public servants, insofar as it raises misgivings over the awarding of contracts to third parties which on the face of it seem questionable, the conduct of public servants generally, good governance, the manner in which government funds are utilised, corrupt practices and abuse of power are serious matters and of legitimate public concern and interest.

[49] In sub-para 9.4 of their defence, a second summary of the report is pleaded by the first and second defendants. In this subparagraph, they also highlighted the stings on the questionable award of the contract of roughly RM55m to construct the Kuala Kedah LKIM Complex in Kampung Geluncur, Kedah and the failure of LKIM to comply with contract award procedures. In this subparagraph, they also pleaded that on 6 April 2007, Wan Hazmir Bakar, a senior journalist with the second defendant, received ostensibly credible information from a reputable source, namely, the Chairman of LKIM, the third defendant, that a report had been lodged with the ACA on 6 February 2007.

[50] In para 9.5 of their defence, they pleaded that the following day, on 7 April 2007, and prior to the publication of the impugned article, the second defendant's Wan Hazmir Bakar contacted the plaintiff who was the incumbent DG of LKIM with a view to seeking his comments, explanation and his version of events, if any, with respect to the allegations. They also pleaded that the plaintiff responded by claiming to have no knowledge of the allegations.

[51] Before making a third reference to the report in para 9.6 of their defence, the first and second defendants pleaded that confirmation that the report was indeed lodged with the ACA was made with the ACA through one of the second defendant's journalists named Farah Naz Karim who had contacted the ACA (specifically) for this purpose.

[52] In para 9.7 of their defence, they pleaded that the impugned article reported the fact of the information that the second defendant had received and the fact of the report having been made to the ACA by LKIM and/or its chairman, the third defendant, based on the grounds alleged. They also pleaded that the second defendant reported these matters in a balanced, fair and responsible manner.

[53] In para 9.8 of their defence, they pleaded that upon publication of the impugned article on 10 April 2007, the second defendant once again but this time through Kamarulzaman Pid contacted the plaintiff the very same day to obtain his comments. They also pleaded that on this occasion the plaintiff claimed that the allegations contained in the report made to the ACA by the Chairman of LKIM, the third defendant, was motivated by malice and was without any basis. He then went on to provide his side of the story to Kamarulzaman Pid.

[54] The fourth reference to the report is in sub-para 9.9 of their defence, where the first and second defendants pleaded that immediately, on 11 April 2007, which was the day after the publication of the impugned article, they caused to be written, printed and published on p 22 of *Harian Metro* an article captioned 'Dakwaan Tidak Berasas' in Malay or 'Allegations Without Basis' in English which contained, inter alia, the gist of the plaintiff's side of the story and his response that the report to the ACA was motivated by malice and without any basis.

[55] The fifth reference to the report is made in sub-para 9.10 of the first and second defendants' defence. In this subparagraph, the first and second defendants pleaded that the impugned article was published during the period in time when articles were being published regularly in the newspapers of the fact of many public officials and departments being investigated by the ACA or having reports lodged against them with the ACA over allegations of improper and corrupt practices and abuse of power.

[56] In the same subparagraph, they also pleaded that all these incidents were in response to the call by the then Right Honourable Prime Minister, upon assuming office, to intensify efforts to investigate and eradicate corrupt practices and abuse of power within the public sector and generally. Hence, they pleaded that the subject matter of the impugned article which is the subject of the instant suit was one of current concern.

[57] In sub-para 9.11 of the first and second defendants' defence, they pleaded that in all the circumstances, the defendants wrote, printed and published the words complained of in full compliance with the duties and obligations of responsible journalism, pursuant to their duty to publish the impugned article to inform the readership of matters which they had a corresponding interest in receiving.

[58] In para 10 of the first and second defendants' defence, they pleaded that the particulars pertaining to falsity are irrelevant insofar as the nature of the defence raised is concerned and that they make no admission to that effect.

[59] In para 11 of the first and second defendants' defence, they denied the plaintiff's averments in para 9 of the plaintiff's SOC that the writing, printing and publication of the words complained of were an act of sensationalism solely motivated by a desire to boost the sale of the daily *Harian Metro*, and to live off the ruin of the plaintiff's career as an administrator in the MADS and the loss of his reputation oblivious to the fact that the words are untrue and that the words complained of were calculated to disparage the plaintiff in his profession.

[60] In the same paragraph, they also denied the plaintiff's averments in para 10 of the plaintiff's SOC that by reason of the publication of the words complained of and in consequence thereof, the plaintiff has been gravely injured in his character and credit and also in his personal and administrative reputation and the plaintiff has suffered considerable distress and embarrassment and has been brought into public scandal, odium and contempt.

[61] In para 12 of the first and second defendants' defence, they pleaded that there is no basis for the plaintiff's claim for aggravated and/or exemplary damages and the matters set out in para 11 of the plaintiff's SOC. They also denied that the impugned article was published in a sensational manner. They also denied that the court ought to infer that they had published the impugned article in the knowledge that the words complained of were libellous and/or with reckless disregard as to whether or not the words complained of were libellous and that they did so because they had established that the prospect of material advantage to themselves by reason of their publication of the words complained of outweighed the prospect of material loss.

[62] In para 13 of the first and second defendants' defence, they denied that the plaintiff is entitled to the injunctive relief claimed by the plaintiff in para 12 of the plaintiff's SOC by reason of the matters pleaded above.

[63] In para 14 of the first and second defendants' defence, they admitted that they had received the plaintiff's solicitors' letter of demand dated 19 April 2007 for a retraction and an apology. However, they pleaded that based on the matters pleaded above, they did not accede to the plaintiff's demands.

[64] In a nutshell, the defence of the first and second defendants consists, inter alia, of the following averments:

(a) the contents of the impugned article was not concerned with the the plaintiff but dealt exclusively with wider issues of public interest;

(b) the impugned article reported merely on the fact that LKIM through its chairman, the third defendant, had lodged a report with the ACA;

(c) the words complained of were published on an occasion of qualified priviledge as they were matters of public concern and interest ie conduct of public servants in the management; corrupt practices; mismanagement of public funds and abuse of power; on the questionable award of the contract for the construction of the LKIM Complex; failing to comply with contract award procedures; a report had been lodged by the third defendant on 6 February 2007 to the ACA; pre-publication verification of the contents of the report was made with the DG of LKIM ie the plaintiff, before the publication of the impugned article containing, inter alia, the fact of the report to the ACA; the matters in the impugned article were reported in a balanced, fair and responsible manner; post publication verification was again made with the plaintiff and the words complained of were published in full compliance with their duty to publish matters of common interest;

(d) on the plaintiff's claim that the defendants have falsely accused the plaintiff of criminal offences in the impugned article, they pleaded as follows: 'the particulars pertaining to falsity are irrelevant as far as the nature of the defence raised herein is concerned and thus the defendants make no admission with respect to the same'; and

(e) based on the matters mentioned above the defendants did not accede to the plaintiff's demand for an apology.

THE THIRD DEFENDANT'S MEMORANDUM OF APPEARANCE AND STATEMENT OF DEFENCE

[65] On 8 August 2011, the third defendant filed his memorandum of appearance, encl 24.

[66] On 23 March 2012, the third defendant filed his statement of defence ('defence'), encl 27.

[67] The third defendant has pleaded the defences of justification, qualified privilege and fair comment upon a matter of public interest.

[68] The court noted that the third defendant has put up the following unconventional defence to the plaintiff's writ of summons and SOC:

(a) the defence was filed without prejudice to his rights to raise objection to the suit;

(b) he joins issue with the plaintiff's SOC;

(c) he denies publication;

(d) the literal translation of the article is irrelevant to the plaintiff's claim;

(e) as the article complained of is in English, the said literal translation should be struck off;

(f) he denies making reference to the plaintiff;

(g) LKIM was managed not by the plaintiff alone but managed and administered by other officers;

(h) the impugned article when read in its entirety and/or particular words read individually are not defamatory;

(i) the impugned article was not written or published by the third defendant;

(j) the plaintiff has failed, refused and/or neglected to specifically plead or attribute the actual words said to have been made by the third defendant, and the corresponding meaning(s) specified thereto which the plaintiff claims to be defamatory;

(k) the third defendant is embarrassed in this regard and reserves his rights;

(l) the words published in the impugned article do not bear any meaning other than their natural and ordinary meaning when read in the context of the entirety of the impugned article;

(m) the words complained of are true in substance and fact;

(n) three direct negotiation contracts were awarded by the management totalling approximately RM55m for:

(i) levelling of land costing RM8m;

(ii) construction of a complex vide direct negotiation 1/2002 costing RM26.6m ('the LKIM Complex'); and

(iii) construction of a 1.8km access road vide direct negotiation 1/2006 costing RM17.8m;

(o) the LKIM Complex could not be used as the jetty was 10 metres from the shore;

(p) the third defendant lodged a report with the ACA by letter dated 6 February 2007 and will rely on the contents of the same;

(q) the construction of the 1.8km access road should have cost no more than RM4m;

(r) the contract was awarded through direct negotiation to the same contractor, namely, Pembinaan Zakaria Salleh Sdn Bhd;

(s) the third defendant will, if necessary, rely on s 8 of the Defamation Act 1957;

(t) the words complained of are fair comment upon a matter of public interest;

(u) as the Chairman of LKIM's Board of Directors, the third defendant is accountable to the public and/or the government in the manner in which LKIM's funds are managed and administered;

(v) the third defendant is entitled to make fair comments on matters pertaining to LKIM's Board of Directors;

(w) the advance payment of RM445,000 made by LKIM was forfeited because the acquisition was not completed;

(x) public funds had been wasted;

(y) the intention to build a complex in Kuala Selangor with a three-star hotel is questionable;

(z) the third defendant seeks to highlight certain concerns in the manner in which LKIM's funds are being managed and administered, which include in some cases the neglect in adhering to procedures, which may result in a wastage of public funds;

(aa) the third defendant will, if necessary, rely on s 9 of the Defamation Act 1957;

(ab) the alleged occasion on which the third defendant stated the words complained of was an occasion of qualified priviledge;

(ac) the third defendant was under a legal, moral and/or social duty to raise issues of concern regarding the management and administration of LKIM's funds, and the public had a like duty and/or interest to receive or hear them through the media;

(ad) the third defendant will rely on, inter alia, a letter dated 6 February 2007 and other relevant documents at the trial of this action; and

(ae) the plaintiff's following averments:

(i) the writing, printing and publication of the words complained of were an act of sensationalism to live off the ruin of the plaintiff's career;

(ii) the defendants were indifferent to promulgating injurious falsehoods and oblivious to the fact that the words are false; and

(iii) the plaintiff has been gravely injured in his character, credit and personal and administrative reputation and has suffered distress and embarrassment; are irrelevant.

[69] The parties called nine witnesses, altogether, in the full trial.

[70] The plaintiff called three witnesses. They are Dato' Annas bin Khatib Jaafar, the plaintiff himself, as PW1; Mr Muhammad Hanif bin Ahmad, the legal officer of LKIM, at the material time, as PW2; and Datuk Che Yazid bin Che Seman, a businessman and a former journalist, as PW3.

[71] The first and second defendants called five witnesses. They are Mr Wan Hazmir bin Bakar, the second defendant's reporter, to whom the third defendant disclosed and handed over a copy of his report which he had lodged with the ACA, as DW1; Puan Farrah Naz bt Abd Karim, a journalist, as DW2; Mr Kamarulzaman bin Pid, the second defendant's Putrajaya Bureau Chief for *Harian Metro*, who wrote the impugned article, as DW3; Mr Shariffudin bin Mohamed, the Executive Director of the *Harian Metro* and also the first defendant himself, as DW4; and Dato' Mustafa bin Haji Ahmad, the Deputy DG of LKIM, at all material times, and who had, subsequently, succeeded the plaintiff as the DG of LKIM, as DW5.

[72] The third defendant called one witness, namely, himself as DW6.

[73] The court noted that throughout the trial, the three defendants stood by their pleadings and whilst the first and second defendants maintained that the article was published as of current concern and on an occasion of qualified privilege, the third defendant relied conclusively on his plea of justification.

DECISIONS OF THE COURT ON LIABILITY AND QUANTUM OF DAMAGES AND COSTS

[74] At the conclusion of the trial, the court granted judgment on liability for damages for libel in favour of the plaintiff against all the three defendants.

[75] The court then adjourned the case to another date for the assessment of damages and costs to be awarded to the plaintiff against all the three defendants ('the first decision of the court').

[76] Being dissatisfied with the first decision of the court, the first and second defendants and the third defendant have filed two separate notices of appeal to the Court of Appeal against the first decision of the court.

[77] At the conclusion of the assessment of damages and costs, the court awarded to the plaintiff general damages of RM30,000 against the first and second defendants and general damages of RM10,000 against the third defendant.

[78] The court dismissed the plaintiff's claims for aggravated and/or exemplary damages against all the three defendants.

[79] The court also dismissed the plaintiff's claims for interlocutory injunctions against all the three defendants as prayed for by the plaintiff in sub-paras (5) and (6) of para 13 of the plaintiff's SOC.

[80] The court awarded to the plaintiff a sum of RM40,000 as costs against the first and second defendants and a sum of RM30,000 as costs against the third defendant ('the second decision of the court').

[81] Being dissatisfied with the second decision of the court, the third defendant has filed a notice of appeal to the Court of Appeal against the second decision of the court.

REASONS FOR THE DECISIONS OF THE COURT

[82] The reasons why the court decided in that manner are as follows.

Issues for the determination of the court

[83] The plaintiff and the first and second defendants have framed the following seven issues for the determination of the court:

(1) whether the words complained of as set out in para 3 of the SOC referred and were understood to refer to the plaintiff?

(2) whether the words complained of have been published by the defendants?

(3) whether the words complained of were true or false?

(4) whether the words complained of were defamatory of the plaintiff?

(5) whether the first and second defendants can rely on the defences of qualified privilege?

(6) whether the primary remedy of defamation by way of an award of damages is available to the plaintiff? and

(7) whether the plaintiff is entitled to claim aggravated and/or exemplary damages?

[84] The plaintiff and the third defendant have framed the following seven issues for the determination of the court:

(a) whether the words complained of as set out in para 3 of the SOC referred and were understood to refer to the plaintiff?

(b) whether the words complained of have been published by the defendants?

(c) whether the words complained of were true or false?

(d) whether the words complained of were defamatory of the plaintiff?

(e) whether the pleas of justification and qualified privilege and a defence of fair comment upon a matter of public interest are available to the third defendant?

(f) whether the primary remedy of defamation by way of an award of damages is available to the plaintiff? and

(g) whether the plaintiff is entitled to claim aggravated and/or exemplary damages?

Subsidiary issues for the determination of the court

[85] The court has framed the following three subsidiary issues for the determination of the court:

(1) whether the third defendant's report to the ACA is an absolutely privileged document?

(2) if the answer to subsidiary issue (1) is in the affirmative, whether the impugned article enjoys ancillary privilege?

(3) whether the court ought to look at the report and read it together with the impugned article in order to determine the first four issues?

Subsidiary issue (1): Whether the third defendant's report to the ACA is an absolutely privileged document?

[86] In my judgment, subsidiary issue (1) ought to be decided in the negative in favour of the plaintiff.

[87] In my judgment, the third defendant's report to the ACA is not an absolutely privileged document.

[88] My reasons are as follows.

[89] It is trite law that a police report made under s 107 of the Criminal Procedure Code ('the CPC') by a complainant to the police is an absolutely privileged document. What this means is that the publication of the contents of the report to the police by the complainant cannot be relied upon by a plaintiff as constituting the evidence of the requisite ingredient of publication in a cause of action based on defamation as the complainant is protected by the defence of absolute privilege in lodging the police report. This was decided by the Federal Court in *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145; [2012] 9

CLJ 833. The Federal Court in that case agreed with the decision in *Abdul Manaf bin Ahmad v Mohd Kamil Datuk Haji Mohd Kassim* that on public policy consideration, absolute privilege should be extended to statements contained in a police report lodged under s 107 of the CPC as in the case of a statement made under s 112 of the CPC. The reason behind this is the overriding public interest that a member of the public should be encouraged to make a police report with regard to any crime that comes to his or her notice. Such a report is important to set the criminal investigation in motion.

[90] In my considered view, a report lodged by a complainant to the ACA is also an absolutely privileged document because it is akin to a police report.

[91] However, in the instant case, the facts show that the third defendant's report was copied to four named individuals as stated earlier in this judgment.

[92] Hence, the third defendant has deliberately opted to publish the contents of his report to third parties rather than to confine or restrict them to the ACA.

[93] In my considered view, by doing that, the third defendant's report has lost the status of an absolutely privileged document which it would have otherwise enjoyed.

[94] Furthermore, after having lodged the report to the ACA, the third defendant has also opted to show and to give a copy of his report to a third party who is totally unconnected with the carrying out of the necessary investigations into his report, namely, Wan Hazmir Bakar, the second defendant's senior news reporter.

[95] In addition to that, the third defendant has pleaded in summary the contents of his report to the ACA in his defence which is a public document upon its filing in the Kuala Lumpur High Court for this suit.

[96] Therefore, it is manifestly clear to the court that the third defendant's report is not an absolutely privileged document.

Subsidiary issue (2): If the answer to subsidiary issue (1) is in the affirmative, whether the impugned article enjoys ancillary privilege?

[97] In my judgment, subsidiary issue (2) ought to be answered in the negative in favour of the plaintiff.

[98] In my judgment, since the court has found that the third defendant's report to the ACA is not an absolutely privileged document, subsidiary issue (2) does not arise for the determination of the court.

[99] Nevertheless, just for the sake of completeness, in view of the written submissions of learned counsel for the first and second defendants and the written submissions of learned counsel for the third defendant on this issue, the court will deal with this issue in more detail later on in this judgment when the court deals with the first and second defendants' defences of qualified privilege and the third defendant's defence of qualified privilege and fair comment.

Subsidiary issue (3): Whether the court ought to look at the report and read it together with the impugned article in order to determine the first four issues?

[100] In my judgment, subsidiary issue (3) ought to be decided in the affirmative in favour of the plaintiff.

[101] In my judgment, the court ought to look at the report and read it together with the impugned article in order to determine the first four issues.

[102] My reasons are as follows.

[103] The court noted that throughout the trial, the first and second defendants denied having sighted much less having taken possession of a copy of the report lodged by the third defendant to the ACA.

[104] This was fortified when in his evidence in the trial the third defendant himself denied having given a copy of his report to the first and second defendants. The court found it strange that after having given prominence to the report in their respective defences, the same was suppressed during the trial by the defendants. This is because as mentioned earlier, the first and second defendants have pleaded in summary the contents of the report in their defence. They had also called for an investigation into the manner in which the contracts for the construction works were awarded which they have alleged to be questionable, did not comply with contract award procedures, and were a reckless use and wastage of government funds.

[105] In my considered view, the first and second defendants have relied on the third defendant's report in their defence. This is because in para 9.3 of their defence, they have pleaded the words 'cara dana kerajaan digunakan dan amalan rasuah serta penyalahgunaan kuasa' in Malay which mean 'the manner in which the government funds were used and corrupt practices as well as abuse of power' in English but these words are not to be found anywhere in the impugned article.

[106] The court also noted that the first and second defendants' witness, namely, Wan Hazmir bin Bakar ('DW1') testified in the trial that he was shown and given a copy of the report by the third defendant.

[107] In para 9.10 of their defence, the first and second defendants pleaded that the impugned article was published during a period in time when articles were being published regularly in the newspapers of the fact of many public officials and departments being investigated by the ACA or having reports lodged against them with the ACA over allegations of improper and corrupt practices and abuse of power.

[108] The plaintiff had brought to the attention of this court that in previous hearings, there were similar articles published in two other newspapers belonging to the second defendant and that it was argued by the counsel for the first and second defendants before other High Courts and observed by those High Courts that the articles concerned were regurgitations of the report (see the first and second defendants' bundle of authorities, Vol 2, at Tab 27, p 105, para (v)).

[109] Hence, in the light of the above, it is my considered view that the impugned article ought to be read together with the report.

THE THIRD DEFENDANT'S REPORT DATED 6 FEBRUARY 2007 TO THE ACA

[110] The third defendant's report to the ACA is reproduced in full below because of the following reasons.

[111] Firstly, based on the evidence adduced in the trial, the court found that it has been declassified by the act of the third defendant in handing over a copy of the report to Wan Hazmir Bakar of the second defendant.

[112] Secondly, all the defendants have relied on the contents of the report in their, respective, defences as mentioned above.

Tarikh: 6 Februari, 2007

Y. Bhg. Datuk Seri Zulkipli bin Mat Noor

Ketua Pengarah

BPR Malaysia

Tingkat 1-7, Blok D6

Pusat Pentadbiran Kerajaan Persekutuan

Peti Surat 6000

62502 PUTRAJAYA

Y. Bhg. Datuk Seri,

PENYELEWENGAN DAN SALAH GUNA KUASA

RUNDINGAN TERUS 1/2006

MEMBINA DAN MENYIAPKAN JALAN MASUK KE

KOMPLEKS LKIM (BARU) KUALA KEDAH

Adalah dengan segala hormatnya saya ingin melaporkan secara rasmi kepada pihak Y. Bhg Datuk Seri berhubung dengan perkara di atas yang pada pengamatan saya berlaku penyelewengan ketara dan salah guna kuasa telah dilakukan oleh Ketua Pengarah LKIM Y. H. Dato' Annas bin Khatib Jaafar.

2. Kompleks LKIM Kuala Kedah telah dibina oleh kontraktor Pembinaan Zakaria Salleh Sdn Bhd beralamat di 8, Taman Jaya, Jalan Langgar, 05460 Alor Setar, Kedah dengan harga RM26,564,222.61 secara Rundingan Terus 1/2002 dan diserahkan kepada LKIM Ibu Pejabat pada 18hb. Mei, 2006.

3. Bagaimanapun Sijil Kelayakan menduduk (CFO) belum pun diperolehi dari PBT dan sepatutnya mestilah masih dalam tanggungan kontraktor. Kontraktor juga masih belum menyiapkan kerja-kerja pembaikan sepenuhnya.

4. Pada 11hb. Disember 2006 sepasukan pegawai dari Jabatan Juruaudit Negara telah melakukan lawatan ke kompleks ini dan mendapati berlaku keretakan pada struktur lantai.

5. Bekalan air untuk bot-bot nelayan hanya menggunakan hos 1 inci dan ini tidak mengikut spek tender.

6. Syarikat yang sama, Pembinaan Zakaria Salleh Sdn Bhd, kemudiannya diberi pula projek Membina dan Menyiapkan Jalan Masuk ke Kompleks LKIM ini sepanjang 1.8 km Gred R4 secara Rundingan Terus 1/2006 bernilai RM18.7 juta seperti Lampiran A berlampir.

7. Setahu saya, melalui pengalaman sebagai bekas Exco Kerja Raya dan Kemudahan Awam Negeri Johor, kos sekilometer jalan Gred R4 tidak melebihi RM4 juta. Jikalau terlibat dengan pembinaan jambatan dan memotong bukit atau baikpulih tanah, mungkin kosnya meningkat sedikit.

8. Tetapi di dalam hal pembinaan jalan 1.8 km ini, tiada sebuah jambatan pun perlu dibina. Kerja-kerja seperti di dalam spek 'SUB-TOTAL' Earthworks; Excavate unsuitable Material, load, haul dan dispose berjumlah RM 1,146,520.00 seperti di dalam Lampiran B langsung tidak berlaku. Ini boleh ditanya kepada penduduk-penduduk kampong sendiri.

9. Apabila saya menbangkitkan bahawa tender ini terlalu mahal dan membazirkan wang kerajaan di dalam Mesyuarat Ahli Jemaah Lembaga LKIM pada 21hb. Disember 2006, Ketua Pengarah Y.H. Dato' Annas b. Khatib Jaafar menjelaskan bahawa ada 'wahyu' dari Perbendaharaan dan beliau terpaksa melaksanakan arahan.

10. Setahu saya, sangat jelas kriteria Rundingan Terus iaitu ia hanya boleh dilakukan sekiranya memerlukan kepakaran tertentu dan tidak semua pihak boleh melakukannya. Jika tidak ia mestilah melalui proses tender biasa.

11. Saya difahamkam bahawa satu lagi Rundingan Terus sedang dibincangkan dengan Pembinaan Zakaria Salleh Sdn Bhd pada masa ini untuk menggali sungai Kuala Kedah Bhdapan dengan Kompleks LKIM Kuala Kedah. Harga yang dicadangkan oleh JKR adalah RM30.00 semeter persegi sementara Pembinaan Zakaria Salleh Sdn Bhd akan cuba merundingkan pada kadar harga RM100.00 semeter persegi.

12. Persoalan-persoalan yang ingin saya kemukakan adalah:

(a) Kenapa tawaran secara Rundingan Terus diberikan kepada syarikat yang sama?

(b) Kenapa harga terlalu tinggi dan langsung tidak munasabah?

(c) Kenapa proses tender biasa tidak dilakukan supaya lebih ramai penender boleh masuk dan LKIM mendapat harga yang lebih rendah dan munasabah?

(d) Kenapa Ketua Pengarah tidak menjalankan tugas lebih telus dan terbuka sesuai dengan kehendak Y.A.B. Perdana Menteri supaya Pegawai Perkhidmatan Awam sentiasa berintegreti tinggi?

(e) Kenapa wang kerajaan tidak dibelanjakan secara berhemah dan jimat?

Semoga aduan saya ini mendapat perhatian Y. Bhg. Datuk Seri dan disiasat, terima kasih.

Adalah saya dengan hormat,

t.t.

(ADAM ABDUL HAMID)

Pengerusi

Lembaga kemajuan Ikan Malaysia

s.k:

Y.A.B. Dato' Seri Haji Abdullah Ahmad Badawi

Perdana Menteri Malaysia

Bangunan Perdana Putra

Pusat Pentadbiran Kerajaan Persekutuan

62502 PUTRAJAYA

Y.Bhg Tan Sri Mohd Sidek bin Hj. Hassan

Ketua Setiausaha Negara

Pejabat KSN, Blok Timur

Jabatan Perdana Menteri

Pusat Pentadbiran Kerajaan Persekutuan

62502 PUTRAJAYA

Y.Bhg. Dato' Dr. Zulkifli b. Idris

Ketua Setiausaha

Kementerian Pertanian & Industri Asas Tani

Wisma Tani

Lot 4G1, Presint 4

Pusat Pentadbiran Kerajaan Persekutuan

62624 PUTRAJAYA

Y.B. Dato' Shahril b. A. Samad

Pengerusi

PAC Malaysia

FINDINGS OF THE COURT

[113] The court noted that the report identified the plaintiff by name as the person who had committed the crimes. The third defendant had accused the plaintiff directly. The crux of the third defendant's report to the ACA against the plaintiff was the misappropriation of funds and the abuse of power in relation to the contract for the construction of the LKIM Complex at Sungai Geluncur, Kedah and the construction of the access road to the LKIM (new) complex at Kuala Kedah by virtue of the method used to award the contracts ie the Direct Negotiation No 1/2002 and the Direct Negotiation No 1/2006.

[114] The report itself is self-explanatory and the linkage is made in one sentence in the introduction itself which states as follows:

> From my observation there has been blatant misappropriation of funds and an abuse of power committed by the Director-General of LKIM Dato' Annas bin Khatib Jaafar.

[115] The blatant misappropriation of funds and the abuse of power committed by the plaintiff were in respect of the matters the third defendant had identified in the following second paragraph of his report:

> 2. LKIM Complex at Kuala Kedah was built by a contractor Pembinaan Zakaria Salleh Sdn Bhd of No. 8, Taman Jaya, Jalan Langgar, 05460 Alor Star, Kedah at the cost of RM26,564,222.61 through Direct Negotiations 1/2002 and delivered up to LKIM Head Office on 18th May, 2006.

[116] The court noted that the first part of the second paragraph is true but the last part is false because the LKIM Complex was never delivered on 18 May 2006. In fact, when the impugned article was published in the *Harian Metro* on 10 April 2007, the new LKIM Complex at Kampung Geluncur in Kuala Kedah in Kedah had not yet been commissioned.

> 3. Nevertheless the certificate of fitness for occupation ('CFO') has not been obtained from PBT which rightly should be the responsibility of the contractor. The contractor has also not completed its repair works.
>
> 4. On 11th December, 2006 a team of officers from the Auditor-General's Department made a visit to this complex and discovered cracks on the floor structure.

[117] The court noted that the new LKIM Complex could not be said to be ready and the CFO could not have been issued because the access road was yet to be constructed. The third defendant knew this and yet he continued as follows in the fifth paragraph:

> 5. For the supply of water to the fishing boats, only 1 inch hose is used and this is not in accordance with tender specifications.

[118] The court noted that at this point in time, as the jetty was still under construction, the jetty could not serve the fishing boats much less supply them with water.

[119] As admitted by the third defendant during his cross examination, it was the third defendant himself who had administered the signature for the phase one contract ie 'Rundingan Terus 1/2002'. He even initiated the tender bid exercise.

[120] The court noted that from the phase one contract, the third defendant moved to the phase two contract ie 'Rundingan Terus 1/2006':

> 6. The same company, Pembinaan Zakaria Salleh Sdn Bhd was later given yet another project to build and complete an access road to this LKIM complex stretching 1.8 km Grade R4 through Direct Negotiations 1/2006 worth RM18.7 million as in Annexure A enclosed.
>
> 7. As far as I know, from my experience as a former Exco for Johor Public Works and Community Services, the cost for one kilometer of Grade R4 road did not exceed RM4 million. If it involved the construction of bridges and cutting of hills or rebuilding of land, the cost might be slightly higher.
>
> 8. But in respect of the construction of this 1.8 km road, no bridges had to be built. Works such as in specification of 'sub-total earthworks; excavate unsuitable material, load, haul and dispose totaling RM1,146,520.00 as in Annexure B did not take place. Questions could be put to the villagers themselves.

[121] The court noted that the plaintiff had proved that like the phase one contract, this phase two contract was also initiated by way of tender bid by the third defendant and it was the third defendant who had also entered into the formal contract with the same contractor ie Pembinaan Zakaria Salleh Sdn Bhd, for and on behalf of the government and yet the third defendant fraudulently reported the following to the ACA:

> 9. When I raised the issue that the tender was too expensive and a waste of the government's money at the meeting of the Members of the board of LKIM on 21st December, 2006, the Director-General, Dato' Annas b. Khatib Jaafar, explained that there was a 'blessing' from the Treasury and he was compelled to carry out the directive.

[122] The court noted that the word 'wahyu' in Malay or 'blessing' in English that was used by the plaintiff in reply to the question raised by the third defendant during the board meeting was in reference to the instruction and sanction given by the then Prime Minister and the direction given by the Treasury to LKIM ('ID5' at p 5 of Bundle 'I' and p 14 of Bundle 'I').

[123] The court was of the considered view that the third defendant's accusations in his report were obnoxious and clearly intended to disparage the plaintiff and to injure the plaintiff's reputation in the estimation of right thinking members of the community.

[124] This is because the third defendant continued as follows in order to substantiate his serious accusations against the plaintiff:

> 10. As far as I know, the criteria for Direct Negotiations is obvious, namely, that it could only be applied in the case which requires specific expertise and that not all parties can perform it. Otherwise it must be done through the normal tender process.

[125] During the trial, it was put to him that he was challenging the decisions of the Treasury. The third defendant was also asked as follows: 'If it was true that it was the wrong criteria to award the contract through direct negotiation, why did the third defendant not confront the then Prime Minister and the Ministry of Finance instead of committing the wrong doing by executing the contract on behalf of the LKIM?'

[126] The third defendant did not offer any answer to the question.

[127] The court found that the following allegation in para 11 of the third defendant's report is a mere concoction. This is because no such contract was ever undertaken based on the evidence adduced before the court.

A

> 11. I understand that one more Direct Negotiation is being discussed with Pembinaan Zakaria Salleh Sdn Bhd at the moment to dredge the Kuala Kedah river bed in front of the Kuala Kedah LKIM Complex. The cost as proposed by PWD was RM30.00 for each cubic metre whilst Pembinaan Zakaria Salleh Sdn Bhd will try to negotiate for the rate of RM100.00 per cubic metre.

B

[128] The court found that the third defendant, who was the proverbial fencing which ate up the rice, had acted in a very vicious and spiteful manner towards the plaintiff when he concluded his report by making the following five serious accusations against the plaintiff.

C

These are as follows:

> 12. I wish to bring forth the following issues:
>
> (a) Why the offer through Direct Negotiation was given to the same company?
>
> D
>
> (b) Why was the price so high and totally unreasonable?
>
> (c) Why can't a normal tender process be followed to enable more people to take part and LKIM to obtain a lower and reasonable price?
>
> E
>
> (d) Why couldn't the Director-General carry out his duties in a more open and transparent manner in line with the wishes of the Prime Minister thus maintaining the integrity of the Public Service Officers?
>
> (e) Why the government moneys were not spent frugally?

F

[129] Hence, it was clear to the court that the third defendant was accusing the plaintiff for his own personal wrongdoings since he was the one who had alleged that there were wrongdoings on the part of the plaintiff in the manner the contracts were awarded and in the exorbitant prices of the contracts awarded to the same contractor named by him in his report ie Pembinaan Zakaria Salleh Sdn Bhd. It was not disputed that the LKIM Complex was built by the same contractor ie Pembinaan Zakaria Salleh Sdn Bhd, at a cost of RM26,564,222.61 through Direct Negotiation No 1/2002 but the third defendant had alleged that there was abuse of power on the part of the plaintiff in the awarding of the contract to the same company through Direct Negotiation No 1/2006 for the construction and completion of the Access Road Grade R4 stretching 1.8km worth RM18.7m.

G

H

[130] Hence, the third defendant is the proverbial person who 'lemparkan batu sembunyikan tangan' in Malay which means 'throws the stone hides his hand' in English in order to conceal his crime or wrong doing.

I

IMPUGNED ARTICLE DATED 10 APRIL 2007

[131] The Malay version of the impugned article is reproduced in full below:

SIASAT KONTRAK LKIM

Lembaga pengarah lapor BPR

PUTRAJAYA: Keraguan berhubung pemberian kontrak dan kerja pembinaan Kompleks Lembaga Kemajuan Ikan Malaysia (LKIM) Kuala Kedah, Kedah bernilai kira-kira RM 55 juta membuatkan Lembaga Pengarah pertubuhan itu sendiri mengemukakan aduan kepada Badan Pencegah Rasuah (BPR).

Pengurusi LKIM, Adam Abdul Hamid, berkata beliau membuat aduan itu kira-kira tiga bulan lalu kerana Lembaga Pengarah tidak berpuas hati dengan tindakan pengurusan yang bukan saja dilihat tidak mengikut prosedur tetapi juga menyebabkan pembaziran.

'Saya sendiri yang membuat aduan kepada BPR kerana saya tidak berpuas hati jika wang kerajaan dibelanjakan secara tidak berhemah dan berlaku pembaziran.

Saya berharap BPR akan membuat siasatan bagi memastikan peruntukan kewangan LKIM dibelanjakan secara berhemah dan mengikut peraturan, katanya', semalam.

Keraguan timbul apabila pengurusan tidak memaklumkan keputusan memberikan kontrak pembinaan kompleks dan kerja-kerja berkaitan kepada sebuah syarikat secara rundingan terus walaupun pembinaan tidak membabitkan kepakaran khusus.

Mengikut prosedur pemberian kontrak kerajaan, kaedah rundingan terus hanya diguna pakai apabila tiada syarikat lain memiliki kepakaran khusus bagi melaksanakan kerja pembinaan berkaitan. Lebih meragukan apabila bangunan kompleks di Kampung Geluncur itu yang siap dibina beberapa bulan lalu dengan kos RM29 juta tidak dapat digunakan kerana jeti pendaratan terletak kira-kira 10 meter dari laut.

Berikutan itu, syarikat sama diberikan kontrak mengorek pasir bagi membolehkan air laut memasuki kawasan jeti tetapi caj RM100 bagi setiap meter padu pasir yang dikorek pula dikatakan melebihi kadar pernilaian Jabatan Kerja Raya (JKR), iaitu RM30.

Syarikat sama juga dikatakan mendapat kontrak bernilai RM17.8 juta bagi membina jalan masuk sepanjang 1.8 kilometer ke kompleks itu dan nilai kontrak itu juga dikatakan jauh lebih tinggi.

[132] The English translation of the first paragraph of the impugned article is reproduced below:

PUTRAJAYA: Suspicion over awards of contract and construction works on Lembaga Kemajuan Ikan (LKIM) Complex in Kuala Kedah, Kedah worth approximately RM55 million compelled the agency's Board of Directors itself to lodge a complaint with the Anti-Corruption Agency (ACA).

Issue (1): Whether the words complained of as set out in paragraph 3 of the SOC referred and were understood to refer to the plaintiff?

Issue (2): Whether the words complained of have been published by the defendants?

Issue (3): Whether the words complained of were true or false?
Issue (4): Whether the words complained of were defamatory of the plaintiff?

[133]

I shall now deal with the first to the fourth issues between the plaintiff and the first and second defendants and between the plaintiff and the third defendant together as they are common issues and they are also very closely interrelated.

[134]

It is trite law that in order for the plaintiff to succeed on his claim for damages for the tort of defamation, the plaintiff must prove the following three essential ingredients of the tort of defamation:

(a) The words complained of are defamatory;

(b) The words complained of are published to a third party; and

(c) The words complained of are defamatory of and concerning the plaintiff.

[135]

In my judgment, issue (1) ought to be decided in the affirmative in favour of the plaintif. In my judgment, the words complained of as set out in para 3 of the SOC referred to and were understood to refer to the plaintiff even though the name of the plaintiff is not stated in the impugned article.

[136]

My reasons are as follows.

[137]

In my judgment, it is clear from a reading of the second paragraph of the impugned article that the reason which was given by the third defendant for lodging the report to the ACA three months back is because the Malaysian Fisheries Development Board or LKIM was not satisfied with the management's actions which were seen not only as wrong procedurally but had also caused wastage (of government funds). Hence, the first and second defendants' defence that the words complained of did not impute guilt on the part of the plaintiff does not hold water.

[138]

In my considered view, the impugned article which contains the words complained of (which was also observed by the learned judge in one of the two other cases involving the publication of an allegedly defamatory article in *The New Straits Times* newspaper ('*The News Straits Times* case') which also

contained the words complained of) was substantially a regurgitation of the third defendant's report to the ACA (first and second defendants' bundle of authorities, Vol 2, Tab 27, p 105).

[139]

The court found PW1, PW2 and PW3 to be honest witnesses. The court also found their evidence to be inherently credible, consistent and cogent and, therefore, reliable. Hence, the court believed and accepted their evidence.

[140]

In his examination-in-chief, Mr Muhammad Hanif bin Ahmad ('PW2') testified that all the wrong accusations both in the report and in the impugned article and as gleaned from the admonishment by the then Right Honourable Prime Minister of Malaysia ('P6') were orchestrated by Adam Abdul Hamid to create a diversion.

[141]

He explained as follows:

(a) Dato' Annas was the civil servant who was tasked to administer and manage LKIM whilst Adam Abdul Hamid was only a political appointee whose duty was to chair the board meetings as and when required;

(b) as a political appointee, Adam Abdul Hamid was also appointed the Chairman of LKIM and the Chairman of its subsidiary, namely, Majuikan. As the Chairman of Majuikan, Adam Abdul Hamid was answerable to the board of LKIM. This includes for irregularities committed against Majuikan. When this happened, much to his chagrin he would be asked to leave the meeting;

(c) the matter came to a head when the majority of its directors lodged a police report against the alleged forgery of their signatures in order to secure a resolution for Majuikan to provide a corporate guarantee per aval and side letter (Bundle 'I' pp 137–138) in favour of MBS, its contractor. The matter came out into the open when Bank Negara Malaysia gave notice of its registration to LKIM;

(d) this was followed by a letter of demand by the bank for the repayment of the loan by Majuikan (Bundle 'I', pp 128–130); and

(e) in retaliation, Adam Abdul Hamid devised a scheme whereby Dato' Annas, as an officer from the 'Perkhidmatan Tadbir dan Diplomatik' in Malay known by the acronym 'PTD' or the 'MADS' in English will be speedily removed from LKIM and it will simultaneously make way for the Deputy DG, namely, Dato' Mustafa Ahmad (DW5), a home grown officer from LKIM itself, to take over his place. Thus, the report was lodged by Adam Abdul Hamid in furtherance of this scheme.

[142]

In his evidence before this court, Adam Abdul Hamid has admitted unequivocally as follows:

(a) the project for the construction of the LKIM Complex was launched as far back as in 1999; and

(b) the contract for the LKIM Complex ie 'Rundingan Terus No 1/2002' and the contract for the Access Road ie 'Rundingan Terus No 1/2006' were executed between the contractor, namely, Pembinaan Zakaria Salleh Sdn Bhd and he himself on behalf of the government. It follows, therefore, that through its Chairman, 'LKIM' in Malay or the 'Malaysian Fisheries Development' in English knew all about the contracts and the procedures adopted in awarding them contrary to the assertions of the third defendant in his report to the ACA.

[143]

The court found that based on the evidence of the plaintiff and his witnesses, the jetty although built ten metres from the sea was not inoperative or useless as contained in part of the stings in the words complained of. This is because their evidence was fortified by the evidence of one of the first and second defendants' own witnesses, namely, Dato' Mustafa Ahmad ('DW5'). He had testified that it provides berths to 3–4 deep-sea vessels at any one given time.

[144]

Based on the evidence adduced before the court, the court found that the Treasury was handling the project and LKIM was tasked to implement its decisions and the ACA report was the third defendant's personal report because it was not lodged on behalf of the Board of Directors of LKIM. The third defendant and the Board of Directors of LKIM also knew all along that the plaintiff was neither involved in the decision to award the contracts to Pembinaan Zakaria Salleh Sdn Bhd nor in the choice of the procedures used to award the contracts.

[145]

The closing paragraph of the impugned article is reproduced as follows:

> The same company is said to have been awarded a contract worth RM17.8 million to build an access road of 1.8 kilometres in length to the complex and it is also said that the value of the contract was also very much higher.

[146]

PW2 had said as follows concerning the closing paragraph of the impugned article:

(a) in the first place, *Harian Metro* employs direct speeches in the article quoting Adam Abdul Hamid;

(b) secondly, Adam Abdul Hamid uses the term 'dikatakan' or 'it is said';

(c) in other words Adam Abdul Hamid himself was not sure; and

(d) it means that this closing paragraph lacks honesty.

[147]

When pressed for further comment, PW2 answered as follows:

(a) why not? As I said, the contracts started with Pembinaan Zakaria Salleh Sdn Bhd which had made an application direct to the Prime Minister;

(b) the Prime Minister had given his blessing to the application (document 'P24', Bundle 'I', p 19);

(c) following the blessing from the then Prime Minister, the Ministry of Finance directed LKIM to implement Phase 2 of the Project, which is the Access Road to the Complex estimated to cost RM18m (P25) (ibid p 21);

(d) the Ministry of Finance approved the negotiated price of RM17.8m (P29);

(e) thereafter, Adam Abdul Hamid entered into an understanding through prebid document ie form of tender between Pembinaan Zakaria Salleh Sdn Bhd and the Government (at pp 201–202 of Bundle 'F' (P30) and (P7));

(f) arising from this understanding (as in form of tender issued by Adam Abdul Hamid on 11 March 2006), Zainun bt Ibrahim (Adam Abdul Hamid's intended witness) of the Finance & Accounts Department for and on behalf of the DG of LKIM (pp 016–019) of Bundle 'F') issued a *surat setuju tender* informing Pembinaan Zakaria Salleh that its application to carry out the works on the proposed construction and completion of the access road to the LKIM Complex by way of direct negotiation No 1/2006 costing RM17.8m has been approved and Pembinaan Zakaria Salleh was required to execute a formal agreement with the Government of Malaysia;

(g) as arranged, the contract document for the proposed construction and completion of the access road to the Kuala Kedah LKIM Complex ie Direct Negotiation No 1/2006, containing the conditions of the contract and the articles of agreement was executed between Shuhaimi bin Ismail as the General Manager of Pembinaan Zakaria Salleh Sdn Bhd and Adam Abdul Hamid himself, as the Chairman of LKIM, for and on behalf of the government (at pp 207–286, in particular, p 211 of Bundle 'F').

(h) upon the execution of the contract document, there arose the need to amend it and it happened three times. These three amendments were administered by Adam bin Abdul Hamid himself (see ibid, respectively, pp 288, 291 and 293); and

(i) So, how does the statement stand?

> Syarikat sama juga dikatakan mendapat kontrak bernilai RM 17.8 juta bagi membina jalan masuk sepanjang 1.8 kilometer ke kompleks itu dan nilai kontrak itu juga dikatakan jauh lebih tinggi?

[148]

In my judgment, the impugned article is false because of the following reasons:

(a) in the first place, *Harian Metro* in its extremity took the third defendant's report as gospel truth to the extent that they forgot their responsibility to make an 'investigative reporting' and in the process they ended up defaming the plaintiff;

(b) they were influenced by the third defendant who was their former fellow newspaper reporter;

(c) they published the article without much thought that no jetty would be built far upstream. Adam Abdul Hamid was playing on words. This creates doubts against Adam Abdul Hamid as the source of the materials unless the materials were published with malice;

(d) the initial contract was awarded when the third defendant himself was the Chairman of LKIM and as such he knew fully well that the contract was awarded not during the watch of Dato' Annas as the DG of LKIM;

(e) the impugned article mentioned that the complex had been completed but in truth it was not;

(f) the article mentioned that the main complex could not be used as the landing jetty was far from the sea. Whereas the function of the main complex has nothing to do with the landing jetty as the unloading of the catch is done by the fishermen themselves but not by LKIM;

(g) the jetty was not built upstream but on the fringe of Sungai Geluncur which is navigable by fishing boats;

(h) the allegation that there was a contract to dredge sand was a total fabrication;

(i) the writing, printing and publication of the impugned article in the *Harian Metro* was based on the report by Adam bin Abdul Hamid to the ACA and the report to the ACA clearly referred to Dato' Annas bin Khatib Jaafar. So in the final analysis, the impugned article in the *Harian Metro* referred, specifically, to Dato' Annas bin Khatib Jaafar and not to the Management of LKIM generally;

(j) moreover, those who were acquainted with Dato' Annas bin Khatib Jaafar would straightaway conclude that the accusation was levelled at Dato' Annas bin Khatib Jaafar and not merely at the management of

LKIM as the witness had testified as follows:

> akan terus membuat kesimpulan bahawa orang yang dituju tidak lain melainkan Ketua Pengarah LKIM, Dato Annas bin Khatib Jaafar.

(k) the entire corps in the MADS knew that the article referred to Dato' Annas bin Khatib Jaafar;

(l) all the members and the committee members of the State Fishermen Associations and the National Fishermen Association registered with LKIM knew that the article was referring to Dato' Annas bin Khatib Jaafar, the Registrar of their Fishermen Associations;

(m) all the staff and officers of LKIM all over the country knew that the accused, Dato' Annas bin Khatib Jaafar, was their head; and

(n) all matters of management were placed on the shoulders of Dato' Annas bin Khatib Jaafar.

[149]

According to PW2 in their natural and ordinary meaning, the article meant and was understood to mean as follows:

(a) Dato' Annas was being investigated for bribery in connection with the construction of the LKIM Complex in Kuala Kedah;

(b) Dato' Annas acted freely without going through meetings and without following procedures; and

(c) Dato' Annas took bribes from the RM29m contracts for the construction of the jetty, from the RM17.8m contract for the construction of the access road to the LKIM Complex and from the (non-existent) contract for the excavation of sand from the river bed.

[150]

PW2 continued to say as follows:

(a) by innuendo, Dato' Annas was guilty of corruption in respect of the award of the contract for the construction of the LKIM Complex to the contractor;

(b) by innuendo, Dato' Annas was guilty of abuse of power;

(c) by innuendo, Dato' Annas was not fit to lead LKIM because he was acting arbitrarily;

(d) by innuendo, Dato' Annas was guilty of awarding contracts through direct negotiations; and

(e) by innuendo, Dato' Annas has committed wrong doings and should be convicted (and sentenced to imprisonment) for his crimes.

[151]

In my judgment, the accusations in the report were false because the plaintiff has proven on a balance of probability based on the testimonies of the witnesses and the documentary evidence as follows:

(a) the project was launched in 1999 long before the plaintiff took office as the DG of LKIM;

(b) all the decisions were made by the Ministry of Finance;

(c) what LKIM did was only to implement those decisions; and

(d) the contracts by way of direct negotiation were signed by none other than Adam Abdul Hamid, the third defendant.

[152]

Hence, the court rejected the defendants' submissions that the words complained of were not capable of bearing any defamatory meaning or any meaning defamatory of the plaintiff (see *Rassam v Budge* [1893] 1 QB 571).

[153]

In my judgment, the two press statements published on 20 May 2007 are sufficient evidence to connect the libel with the plaintiff (see *Sadgrove v Hole* [1901] 2 KB 1 at p 5) and there is also the statement in the impugned article that reported that when the plaintiff was approached his comments for he said he had no comments.

[154]

It is trite law that the question is not whether anyone did identify the plaintiff as the person referred to in the words complained of contained in the impugned article but whether persons who were acquainted with the plaintiff could identify him from the words used. It is not necessary that the words should refer to him by name provided that the words would be understood by reasonable people to refer to the plaintiff and this is the test in every case (see *E Hulton & Co v Jones* [1910] AC 20 (HL)).

[155]

The question, therefore, is whether the libel designates the plaintiff in such a way as to let those who know him understand that he was the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant ie 'meant by the words employed' (per Lord Shaw in *E Hulton & Co v Jones*, at p 26).

[156]

In *David Syme & Co and Another v Canavan* (1918) 25 CLR 234, the High Court of Australia found that the words complained of were defamatory, that is to say, they tended to create a bad opinion of any person whom they could be shown to refer. But the plaintiff was not named.

[157]

In determining the identity of the plaintiff, Isaac J applied the following

test at p 238:

> The test whether words that do not specifically name the plaintiff refer to him is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But *although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognized*; and whether that description takes the form of word-picture of any individual or the form of a reference to a class of persons of which he is or is believed to be a member, or any other form, *if in the circumstances the description is such that a person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is sufficient reference to him.* (Emphasis added.)

[158]

As stated earlier, the plaintiff, namely, Dato' Annas bin Khatib Jaafar, was the DG of LKIM and in that capacity he was the Head of its Management and the Registrar of the Fishermen Associations. To the fishermen nationwide as testified by ('DW5'), the DG is synonymous with LKIM as, if not for anything else, they enjoy diesel subsidies provided by LKIM.

[159]

Hence, based on the testimonies of the plaintiff himself ('PW1'), the plaintiff's witness ('PW2') and the first and second defendants' witness ('DW5'), the court rejected the submissions of the first and second defendants in para 76 of the first and second defendants' submissions that the language used in the impugned article is incapable in law of identifying the plaintiff as the person defamed.

[160]

It is trite law that it is immaterial that the defendant did not intend to refer to the plaintiff, or did not even know of his existence. The question is whether the words complained of can be understood by reasonable people who knew or knows the plaintiff, to refer to the plaintiff, no matter what the intention of the defendant may have been when the words complained of were used by the defendant (see *Jones v E Hulton & Co* [1909] 2 KB 444 (CA) which was affirmed by the House of Lords and reported in *E Hulton & Co v Jones* [1910] AC 20 (HL).

[161]

Coming closer to home, James Foong J (as he then was) in *Le Mercier's Fine Finishings Pte Ltd & Anor v Italcomm (Malaysia) Sdn Bhd* [1996] MLJU 365; [1996] 3 CLJ 590 said as follows at p 594 when referring to the case of *AJA Peter v Og Nio & Ors* [1980] 1 MLJ 226:

> In this case the plaintiffs are not expressly named. Where words do not expressly refer to the plaintiffs, they may still be considered to be referred to the plaintiffs if, the ordinary sensible reader with the knowledge of special facts could and did understand them to be referred to the plaintiffs. For this, there must be some

extrinsic facts so known to some readers who knew the plaintiffs would understand that it was the plaintiffs who were being referred to.

[162]

In my judgment, in the instant case, the irresistible conclusion arrived at by the court was that the article referred to and was understood to refer to the plaintiff as the DG of LKIM and as the head of the management of LKIM and in that capacity, in the eyes of the public, he was responsible for the awarding of the contracts to the same company at inflated and exorbitant prices without following the proper procedures and leading to the wastage of government funds and on top of that the constructed complex which was built at such a far distance away from the sea ie at a distance of 10 metres inland, could not be used for the purpose for which it was built.

[163]

Thus, it was imputed to him as follows in Malay:

(1) berhubungan pemberian kontrak dan kerja-kerja pembinaan Kompleks Lembaga Kemajuan Ikan (LKIM) Kuala Kedah, bernilai kira-kira RM55 juta;

(2) Lembaga pengarah tidak berpuashati dengan tindakan pengurusan yang bukan saja tidak mengikut prosedur tetapi juga menyebab pembaziran;

(3) wang kerajaan dibelanjakan secara tidak berhemah dan berlaku pembaziran;

(4) pengurusan tidak memaklumkan;

(5) memberikan kontrak pembinaan kompleks dan kerja-kerja berkaitan kepada sebuah syarikat secara rundingan terus;

(6) bangunan di kampong Geluncur itu yang siap dibina beberapa bulan lalu dengan kos RM29 juta tidak dapat digunakan;

(7) jeti pendaratan terletak kira-kira 10 meter dari laut;

(8) syarikat sama diberi kontrak mengorek pasir bagi membolehkan air laut memasuki kawasan jeti;

(9) caj RM100 bagi setiap meter padu pasir yang dikorek melebihi kadar penilaian RM30 oleh JKR;

(10) syarikat sama mendapat kontrak bernilai RM17.8 juta untuk membina jalan masuk sepanjang 1.8 kilometer ke kompleks itu; and

(11) nilai kontrak itu lebih tinggi.

[164]

I noted that in their submissions, the first and second defendants when applying the test laid down in *Knupffer v London Express Newspaper, Limited* [1944] AC 116 (HL) to the facts of the instant case concluded that the language used in the words complained of is quite simply incapable in law of identifying the plaintiff as the person defamed. However, I also noted that they

have also submitted as follows:

> The impugned article, if at all, refers merely to LKIM generally, or the management of LKIM specifically the words '... tidak berpuas hati dengan pengurusan'.

[165]

Furthermore, counsel for the first and second defendants has also relied heavily on *Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd* [2010] 9 MLJ 320; [2010] 7 CLJ 885 in support of his submissions that the impugned article merely reported allegations against the plaintiff without making any imputation of guilt on the plaintiff's part. This court noted that in that case, the court held that the news article had merely reported that an allegation of rape was contained in a police report lodged against the plaintiff. In my judgment, that case and all the other cases cited by the counsel in support of his submissions are distinguishable on facts because they are all based on mere allegations without any prejudgment on the guilt of the plaintiff unlike what has occurred in the instant case.

[166]

In the present case, however, there are clear and express imputations of guilt. Hence, the court agreed with and accepted the submissions of the plaintiff that all the cases referred to by the first and second defendants are inapplicable because they are distinguishable on facts.

[167]

The following passages are clear imputations of guilt on the part of the plaintiff in the instant case:

(1) the Board of Directors was not satisfied with the management's actions which were seen not only as wrong procedurally but had caused wastage;

(2) I myself lodged the report with the ACA because I was dissatisfied when government funds are being utilized improperly resulting in wastage;

(3) The ACA investigation 'will ensure that the financial allocation for LKIM will be utilized properly and in accordance with procedures;

(4) The 'direct negotiation machanism was used notwithstanding that the construction involved no specific expertise';

(5) The Complex costing RM29 million is a white elephant;

(6) The jetty built far inland has been rendered inoperable and impracticable;

(7) 'The same company was awarded a contract again and again'; and

(8) The Government has been made to spend a huge sum of money for the construction of just 1.8 kilometre of road.

[168]

Hence, it is crystal clear that the third defendant did not merely make allegations of impropriety against the plaintiff. What the third defendant did

was to make charges and imputations of corrupt practices, misappropriation of funds and abuse of power against the plaintiff as reflected in the report.

[169]

As mentioned earlier, the first and second defendants have pleaded that they made two verifications with the plaintiff concerning the truth of the contents of the report with the plaintiff to show that they had carried out responsible investigative journalism.

[170]

The court noted that in answer to question 9 of his witness statement ('D35'), Wan Hazmir bin Bakar ('DW1') had testified beyond the scope of the article itself when he touched on the LKIM management and said that it raised the question of the manner in which the government funds were being utilised. He had answered, inter alia, as follows:

> 'sama ada terdapat amalan rasuah serta penyalahgunaan kuasa' (in Malay or 'whether there were corrupt practices and abuse of power' in English).

[171]

It was clear to the court that he was referring to the contents of the report.

[172]

DW1 also admitted that he had contacted the plaintiff on 7 April 2007 and on 10 April 2007 in order to verify the accusations of the third defendant against the plaintiff in his report to the ACA.

[173]

The significance of the 'verification' could be gathered from the testimony of the plaintiff's third witness. He is Datuk Yazid Othman, the President of the Malay Journalist Association ('PW3'). PW3 explained that there was a trade secret. It was the formula employed by journalists for writing news stories. The formula is known as Code 5W+1H. The '5W' stands for the following words:

> WHO? WHAT? WHERE? WHEN? and WHY?

[174]

The '1H' stands for the following word:

> HOW?

[175]

Consequently, no newspaper would accept a news story for publication that is not written in accordance with the formula.

[176]

As it was imperative to stick rigidly to the formula, the element WHO must be fulfilled. So, not one but two verifications were made with Dato' Annas bin Khatib Jaafar ('PW1'), the DG at the material time under Code 5W+1H

because it was only the plaintiff who could satisfy Code 5W+1H. Unless DW1 had all the answers to the six questions, DW1 could not be said to have the full story.

[177]

If the purpose of the verification, as pleaded in sub-para 9.5 of the first and second defendants' defence, was made with a view to seeking his comments, explanation and his version of events, then the sole source of the comments, explanation and the version of events was none other than the plaintiff for the simple reason that the plaintiff was the person referred to in the impugned article.

[178]

Subsequent to the publication of the impugned article, verification was made by DW1 with the plaintiff ('PW1') again, and according to the submissions of the learned counsel for the first and second defendants, it was made to get the view of the other side ie the plaintiff's side.

[179]

Turning to the report, in his examination-in-chief, Wan Hazmir bin Bakar ('DW1') in answer to question 10 said that he made another verification on 7 April 2007 with the plaintiff 'iaitu seorang pegawai LKIM yang berpangkat tinggi dan yang bertanggungjawab' in Malay which mean 'a high ranking officer in the LKIM who was responsible' in English concerning the imputations contained in the report.

[180]

It is apparent to the court that in saying that, DW1 was referring to none other than the opening paragraph of the report which reads as follows:

> Adalah dengan segala hormatnya saya ingin melaporkan secara rasmi kepada pihak Y. Bhg Datuk Seri berhubung dengan perkara di atas yang pada pengamatan saya berlaku penyelewengan ketara dan salah guna kuasa telah dilakukan oleh Ketua Pengarah LKIM Y. H. Dato' Annas bin Khatib Jaafar.

[181]

The court was of the considered view that the word 'rasuah' in Malay which means 'bribe' in English and the words 'penyalahgunan kuasa' in Malay which mean 'abuse of power' in English used by DW1 in his answer to question 9 must have been quoted from the report because these words were not used in the impugned article.

[182]

Therefore, the court was satisfied that the libel has designated the plaintiff in such a way that those who know him understood that he was the person meant.

[183]

Hence, the court rejected the submissions of all the three defendants that the words complained of did not refer to the plaintiff.

[184]

In *Jones v E Hulton & Co* [1909] 2 KB 444 at p 454 Lord Alverstone CJ said as follows:

> If upon evidence the jury are of the opinion that ordinary sensible readers, knowing the plaintiff, would be of the opinion that the article referred to him, the plaintiff's case is made out.

Whether the words complained of are defamatory?

[185] In my judgment, this issue ought to be decided in the affirmative in favour of the plaintiff. In my judgment, the words complained of in the impugned article are defamatory.

[186] My reasons are as follows.

[187] It is trite law that in determining whether the words complained of are defamatory, the court has to determine the natural and ordinary meaning of the words complained of. In doing that the court will have to decide what meaning the words would have conveyed to an ordinary, reasonable person using his general knowledge and common sense (see *Microsoft Corporation & Ors v SM Summit Holdings Ltd & Anor and other appeals* [1999] 4 SLR 529 per LP Thean JA).

[188] On this issue the court agreed with and accepted the first and second defendants' submissions that the defamatory nature of an imputation is to be ascertained by moral and social standards generally. Having applied that test to the words complained of in the impugned article, the court concluded that they gave rise to the following imputations which flow from the serious accusations levelled at the plaintiff:

(a) the plaintiff is guilty of receiving or agreeing to receive for himself gratification as a reward for awarding a contract by way of direct negotiation for the construction and completion of the LKIM Complex at Kampung Geluncur in Kuala Kedah worth about RM55m;

(b) the plaintiff is guilty of receiving or agreeing to receive for himself gratification as a reward for awarding a contract by way of direct negotiation to the same contractor for building the access road to the Kuala Kedah LKIM Complex for RM17.8m when the normal estimate for the construction of a road of 1.8km should only be RM5m;

(c) more seriously, the plaintiff is guilty of receiving or agreeing to receive for himself gratification as a reward for awarding a contract by way of

direct negotiation for the construction and completion of the main complex with a jetty landing costing RM29m but which when completed was useless; and

(d) the plaintiff is guilty of receiving or agreeing to receive for himself gratification as a reward for awarding a contract to the same contractor by way of direct negotiation to dredge sand to allow sea water to reach the jetty which has been built by the same contractor 10m away from the sea at the cost of RM100 per cubic metre against PWD's valuation of only RM30 per cubic metre.

[189] It is trite law that words imputing a criminal offence are actionable without proof of special damage (see *Webb v Beavan* (1883) 11 QBD 609).

[190] At p 610 Pollock, B said as follows:

> Words which impute any criminal offence are actionable per se.

[191] In my judgment, contrary to the submissions of the first and second defendants, the words complained of when read as a whole and in its context in the impugned article convey a defamatory meaning. This is because the words such as 'pemberian kontrak dan kerja-kerja pembinaan Kompleks LKIM bernilai RM55 juta membuatkan Lembaga Pengarah pertubuhan itu sendiri mengemukakan laporan kepada Badan Pencegah Rasuah' in Malay which mean 'the awarding of contracts and construction works of the LKIM Complex costing RM55 million caused the Board of Directors of the organization itself to lodge a report to the ACA' in English are words which impute to the plaintiff the commission of the crime of bribery and corruption for which he can be made to suffer 'corporally by way of punishment'.

[192] It is also trite law that since the libel is contained in a paragraph in a newspaper, not only the paragraph itself but also the heading used ie 'Siasat kontrak LKIM Lembaga Pengarah lapor kepada BPR', in Malay or 'Investigate LKIM contracts Board of Directors report to ACA' in English must be taken into account. This is because words in themselves apparently innocent may be shown to have a defamatory meaning when they are read with reference to the circumstances in which they were written and with reference to the context in which they appear. The circumstances and context are contained in the heading of the third defendant's report to the ACA which reads as follows:

> Penyelewengan Dan Salah Guna Kuasa Rundingan Terus 1/2006 Membina Dan Menyiapkan Jalan Masuk Ke Kompleks LKIM (Baru) Kuala Kedah' in Malay which mean 'Misappropriation and Abuse of Power in the Direct Negotiation 1/2006 to Build and Complete the Access Road to the LKIM (New) Complex in Kuala Kedah in English.

[193] In my judgment, there is no doubt that the impugned article was written and published with reference to the report lodged by the third defendant 'kira-kira tiga bulan lalu' in Malay ie 'about three months ago' in English, and in the context of the report in which those words appear.

[194] It is trite law that the crime imputed need not be indictable; it is sufficient if it be triable summarily (see *Webb v Beavan* (1883) 11 QBD 609 per Lopes J at p 610).

[195] The exact offence need not be specified because words involving a general charge of criminality such as 'wang kerajaan dibelanjakan secara tidak berhemah dan berlaku pembaziran' in Malay which mean 'Government funds are expended in an extravagant manner resulting in wastage' in English imputed misappropriation of funds by the plaintiff. Therefore, they will suffice as they impute some offence for which the plaintiff can be made to suffer corporally by way of punishment (see *Webb v Beavan* (1883) 11 QBD 609).

[196] Words to the effect that the contracts were manipulated without going through open tenders and given to one and the same company imputed bribery and an abuse of power. These words directly tend to injure or prejudice the reputation of the plaintiff in the way of the office held by him as the DG of LKIM. These words are actionable without proof of special damage.

[197] Therefore, in my judgment, the plaintiff has proved on a balance of probability that the words complained of in the impugned article were published in reference to his character and to his conduct in his office as the DG of LKIM and in his profesion as a career public administrator in the MADS.

[198] In *Daucey v Holloway* [1901] 2 KB 441, AL Smith MR said as follows at p 4476:

> It is important to consider, not only what are the words complained of, but also the circumstances under which they were uttered.

[199] Hence, in my judgment, to say as follows of the DG of LKIM who is from the MADS:

> 'kontrak bernilai RM17.8 juta bagi membina jalan masuk sepanjang 1.8 kilometer ke kompleks itu dan nilai kontrak itu juga dikatakan jauh lebih tinggi' in Malay which mean 'contract worth RM17.8 million to build an access road of 1–8 kilometer to the Complex and the value of the contract is also said to be far higher' in English.

is defamatory of him because it has the effect of affecting him adversely in the estimation of reasonable people generally. This passage alone exposes him to

ridicule and contempt. This part of the impugned article has a tendency to injure him in his office as the DG of LKIM and his profession as a career public administrator in the MADS. This statement is false about him to his discredit. The words tend to lower him in the estimation of right thinking members of society generally.

[200] In *Scott v Sampson* (1882) 8 QBD 491 at p 503, Cave J said as follows:

> Speaking generally the law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by a false statement to his discredit.

[201] Reverting back to the instant case, the court agreed with and accepted the first and second defendants' submissions that it is trite law that in deciding whether the words complained of as pleaded and set out in the plaintiff's SOC are defamatory, the court must take into account not only the actual words used, but the context in which they were used.

[202] The court noted that the context in which the words complained of were used has been pleaded by the plaintiff. This is because the entire report lodged by the third defendant to the ACA, which contains the situation, events or information that were related to the impugned article in which the words complained of were used, has been pleaded word for word in para 3 of the plaintiff's SOC. The court also noted that a copy of the report has been annexed to one of the plaintiff's pleadings ie the plaintiff's reply to the defence of the third defendant.

[203] In *Irene Fernandez v Utusan Melayu (M) Sdn Bhd & Anor* [2008] 2 CLJ 814 the court held that it is defamatory if the words were calculated to expose the plaintiff to hatred, ridicule or contempt in the mind of a reasonable man or they tend to lower him in the estimation of right thinking members of society in general. In my judgment, the words complained of by the plaintiff in the instant case have satisfied the test in that case.

[204] This is because the words complained of are as follows:

(a) 'wang kerajaan dibelanjakan secara tidak berhemah';

(b) 'bangunan kompleks di Kampung Geluncur yang siap dibina beberapa bulan lalu dengan kos RM29 juta tidak dapat digunakan';

(c) 'Syarikat (yang) sama mendapat kontrak bernilai RM17.8 juta bagi membina jalan masuk sepanjang 1.8 kilometer ke kompleks itu dan nilai kontrak itu juga dikatakan jauh lebih tinggi';

(d) 'Pengurusan tidak memaklumkan keputusan memberikan kontrak pembinaan kompleks dan kerja-kerja berkaitan secara rundingan terus (kepada lembaga pengarah)'; and

(e) 'Siasat kontrak LKIM ... bagi memastikan peruntukan kewangan LKIM dibelanjakan secara berhemah' (apparently to prevent further misappropriation of funds, bribery and abuse of power).

[205] In my judgment, the aforesaid words, when applying the test laid down in *Wong Yoke Kong & Ors v Azmi M Anshar & Ors* [2003] 4 MLJ 96, would convey to the ordinary person the following ordinary and natural meaning:

(a) the management of LKIM headed by the plaintiff as the DG of LKIM was being probed by the ACA;

(b) investigations were being triggered by complaints lodged to the ACA against the management for corrupt practices by none other than its own chairman, namely, Adam Abdul Hamid;

(c) three months were to elapse before Adam Abdul Hamid declassified the complaint to the ACA and brought it to the mass media;

(d) the management was guilty of corrupt practices by not following government procedures which have thereby caused loss to the government;

(e) by declassifying his complaints to the ACA and by going to the press Adam Abdul Hamid's hopes of getting the cases of misappropriation of Government funds, corrupt practices and abuse of power investigated by the ACA and, subsequently, securing a conviction for each of the cases were brighter;

(f) the management was acting wrongfully when it failed in its legal duty to inform the board of LKIM of its decision to award contracts by way of direct negotiations for construction works which needed no specific expertise;

(g) the management was guilty of corrupt practices involving the (new) LKIM Complex at Kuala Kedah in Kedah costing RM55m;

(h) the case in point was the LKIM Complex at Kampung Geluncur costing RM29m which when ready a few months ago was not delivered up for which it was built as the jetty was located 10 metres inland;

(i) the distance between the jetty and the sea was purposely planned in furtherance of the objective of creating opportunities for the management to indulge in more corrupt practices when the same company was awarded the contract to dredge the sand from the river ie Sungai Geluncur in order to enable the sea to reach the jetty so that the fishing boats from the sea can land at the jetty;

(j) the contract to bring the sea water into contact with the jetty costs the government RM100 per every cubic metre of sand dug and this rate was flying in the face of an earlier rate set by the PWD at only RM30 per every cubic metre;

(k) more corrupt practices were committed by the management of LKIM under the leadership of the DG of LKIM when there was a need to build an access road to the LKIM Complex at Kuala Kedah from the main road at a distance of 1.8km because the same company was awarded this construction contract for a hefty sum of RM17.8m which was higher than the normal price for such a contract; and

(l) in order to secure contracts to the same company, the management entered into direct negotiation with the same company in total disregard of certain stipulations that the procedure for the procurement of government contracts requires that the direct negotiation method of awarding a contract would only be employed if a certain expertise was required and there was no other company which could offer such a service.

[206] Having established the above matters, under the circumstances in which the words were published, the reasonable man would understand them in the following defamatory sense:

(a) by way of false innuendo as follows:

(i) the plaintiff was guilty of corrupt practices over contracts awarded by LKIM;

(ii) a report has been lodged by none other than LKIM's own chairman with the ACA;

(iii) but the ACA has not done anything for the past three months since the date the report was lodged by the Chairman of LKIM;

(iv) therefore, the chairman, has resorted to declassifying his report and has gone to the press to tell the whole world about the Management of LKIM abusing his position for his personal gratification;

(v) the corrupt practice was first committed by the plaintiff in awarding the contract for the construction works for the LKIM (new) Complex at Kuala Kedah in Kedah to a single company and this company failed to deliver contractually, coupled with faulty designs, and one such faulty design was when the jetty was located 10m away from the sea;

(vi) these failures and the faulty design gave rise to further awards to the same company at exorbitant prices;

(vii) one of them was the contract for the construction of the access road

to the LKIM Complex which was marked up from RM5m–17.8m;

(viii) a total sum of about RM55m was involved in the scam;

(ix) all the disclosures were made by none other than the Chairman of LKIM himself;

(x) the contracts were manipulated without going through open tenders; and

(xi) the contracts were given to one and the same company without the knowledge and the requisite approval of the Chairman of LKIM or the Board of Directors of LKIM.

(b) by way of legal innuendo as follows:

(i) the plaintiff was guilty of receiving or agreeing to receive for himself gratification as a reward for awarding a contract by way of direct negotiation for the construction and completion of the LKIM Complex at Kampung Geluncur in Kuala Kedah worth about RM55m;

(ii) the plaintiff was guilty of receiving or agreeing to receive for himself gratification as a reward for awarding a contract by way of direct negotiation to the same contractor for building the access road to the Kuala Kedah LKIM Complex at Kampung Geluncur in Kuala Kedah for RM17.8m which in accordance with the normal estimate for a road of 1.8km long should only be RM5m;

(iii) more seriously, the plaintif was guilty of receiving or agreeing to receive for himself gratification as a reward for awarding a contract by way of direct negotiation for the construction and completion of the landing jetty at a price of RM29m when upon completion it was useless;

(iv) the plaintiff was guilty of receiving or agreeing to receive for himself gratification as a reward for awarding a contract to the same contractor by way of direct negotiation to dredge the sand from the river bed in order to allow the sea water to reach the jetty area because the jetty has been built by the same contractor 10 metres away from the sea at a cost of RM100 per cubic metre against the PWD's valuation of only RM30 per cubic metre; and

(v) the plaintiff was guilty of receiving or agreeing to receive for himself gratification as a reward in paying a deposit of RM445,000 towards the purchase of a new building at Kota Baru, Kelantan for LKIM, in addition to its own existing head office there, for the purchase price of RM445m.

[207] In my considered view, the words complained of are defamatory of the

plaintiff because words which suggest that the contracts were manipulated without going through open tenders and given to one and the same company impute bribery and abuse of power. These words directly tend to injure or prejudice the reputation of the plaintiff in the way of the office held by him as the DG of LKIM. Therefore, in my judgment, these words are actionable without proof of special damage.

[208] The court agreed with and accepted the plaintiff's submissions that the attempts by the three defendants to bring the decided cases involving the publication of the impugned articles concerned in the *Berita Harian* newspaper and *The New Straits Times* newspaper to bear on the present case concerning the publication of the impugned article by the *Harian Metro* newspaper is a futile exercise. This is because of the factual outlines in the two other cases, namely, *Dato' Annas bin Khatib Jaafar v Datuk Manja Ismail & Ors* [2011] 8 MLJ 747 and *Dato' Annas Khatib Jaafar v The New Straits Times Press (M) Bhd & Ors* [2013] 10 MLJ 640 are at variance with the factual outline in the instant case.

[209] In the case of the *Berita Harian* newspaper, the third defendant was not at the trial and this omission precluded the court from having before it the true and full facts of the case without the benefit of the contract documents relating to the contracts which were awarded by LKIM to Pembinaan Zakaria Salleh Sdn Bhd. To a certain extent, a similar situation took place when the court during the initial case management proceedings of the instant case directed both parties to file their, respective, affidavits in order to enable the learned judge to determine whether or not the present case should be struck out on the ground of res judicata. After the parties had complied with the direction, the learned judge ruled that the principle of res judicata was applicable to the facts and circumstances of the instant case. However, on appeal by the plaintiff, who was dissatisfied with the decision of the learned judge, the Court of Appeal allowed the plaintiff's appeal and remitted the case back to the High Court for trial.

[210] Therefore, in my judgment, the attempt by learned counsel for the first and second defendants to invoke the doctrine of 'stare decisis' by which precedents are authoritative and binding and must be followed is misplaced. Moreover, the doctrine of 'stare decisis' does not apply because as stated earlier the factual matrix of the instant case and the two other cases are different.

[211] As mentioned earlier, the first and second defendants had previously admitted that the impugned articles in the two other cases and in the instant case were the regurgitations of the ACA report. This court noted that the ACA report begins with the following direct accusations against the plaintiff:

PENYELEWENGAN DAN SALAH GUNA KUASA RUNDINGAN

TERUS 1/2006 MEMBINA DAN MENYIAPKAN JALAN MASUK KE KOMPLEKS LKIM (BARU) KUALA KEDAH

Adalah dengan segala hormatnya saya ingin melaporkan secara rasmi kepada pihak Y.Bhg Datuk Seri berhubung dengan perkara di atas yang pada pengamatan saya berlaku penyelewengan ketara dan salah guna kuasa telah dilakukan oleh Ketua Pengarah LKIM Y.H. Dato' Annas bin Khatib Jaafar.

[212] The above heading and the opening paragraph were the work of the third defendant who was a former reporter. Thus, when he wrote up the complaint he started with the result and all the subsequent paragraphs qualified it by giving additional information.

[213] However, the first and second defendants have relied on *Flood v Times Newspapers Ltd* [2012] 2 AC 273 and 18 other cases in order to arrive at a conclusion, that the allegation or suspicion of abuse of power or impropriety or corruption which has been referred to the ACA for investigation by the third defendant by way of complaint lodged, as reported in the impugned article, cannot amount to a meaning which suggests that LKIM or anybody else including the plaintiff is guilty of the said allegations referred to the ACA for investigation.

[214] However, in my considered view, this argument is hollow for the following reasons.

[215] Learned counsel for the first and second defendants is not only blowing hot and cold but he is flip-flopping as well.

[216] All the attempts by the three defendants to play down and shrug off the role played by the third defendant's report to the ACA should fail. Other than their previous contentions that the impugned articles were regurgitations of the report and was so held by the High Court in the *News Straits Times* case, the report was the backbone of their defences in the instant case and for this reason the plaintiff had annexed it to his reply to the three defendants' defences to reveal the truth of the matter.

[217] This court also noted that in their attempts to trivialise the effect of the report by avoiding the use of the word 'regurgitation', at para 68(v), p 37 of their submissions, the first and second defendants have submitted that the impugned article reported on a matter which actually took place ie the referral to the ACA in the form of a complaint lodged of several dealings or transactions entered into by LKIM which were suspected or perceived to be questionable, and, hence, the third defendant was calling for an investigation by the ACA.

[218] Nevertheless, in my considered view, the heading and the opening paragraph of the report as contained in F007 (P2) are sufficient to show that the first and second defendants are clutching at straws.

[219] This is because the first and second defendants cannot be heard to say as follows:

> I, therefore, reiterate and submit once again that the words complained of as contained in the impugned article B1(P3) are not defamatory of the plaintiff or are capable of bearing a meaning defamatory of him personally.

[220] Or as follows:

> As such, the plaintiff has failed to establish the first element required in order to maintain a cause of action in defamation. His claim should, therefore, be dismissed with costs on this ground alone without having to proceed to consider the defence of qualified privilege relied on by the defendants.

Whether the words complained of were published to a third party?

[221] In my judgment, this issue ought to be answered in the affirmative in favour of the plaintiff.

[222] In my judgment, the words complained of were published to a third party.

[223] My reasons are as follows.

[224] In the instant case, publication of the words complained of has not been disputed by all the three defendants.

[225] With regard to the first and second defendants, there is no dispute that the words complained of were published by the first and second defendants in the *Harian Metro* to a third party ie the readers of the *Harian Metro*.

[226] With regard to the third defendant, the court found conclusively based on the evidence before the court that the words complained of were published to a third party ie to the four persons to whom the report was copied and also to Wan Hazmir Bakar when the third defendant handed over to the latter a copy of the report that the third defendant had lodged with the ACA.

[227] On this issue, the court noted that the third defendant, in para 2 on p 4, of his written submissions on liability, had also stated as follows:

> In the present matter, publication is not disputed.

Failure of the defendants to comply with the plaintiff's requests for an apology

[228] Notwithstanding an attempt by the paintiff to resolve the matter without recourse to the court, as is apparent from the letter dated 19 April 2007 issued through his previous solicitors to the defendants, the defendants were not prepared to do anything to prevent further dissemination of this serious libel against the plaintiff.

[229] The object of the letter before action that was issued by the plaintiff was firstly, to enable the defendants to correct or withdraw the impugned statements and to apologise to the plaintiff and secondly, to vindicate the plaintiff's character.

[230] In their defence and in response thereto, the first and second defendants pleaded that due to the matters aforesaid, they did not accede to the plaintiff's demands.

[231] The third defendant, on the other hand, dismissed it pompously saying that the letter before action was irrelevant. Since malice is an issue here, such pomposity ought to strengthen the plaintiff's case against him.

Whether the defendants were actuated by malice?

[232] The publication of a defamatory statement gives rise to a prima facie cause of action. This is because the law presumes in the plaintiff's favour that the words are false, unless and until the defendant proves to the contrary. Here the defendants have not proved to the contrary. On the other hand, the plaintiff has proved through the third defendant himself, that every allegation and imputation in the words complained of were false.

[233] The following matters have been proved false:

(a) the heading itself is false as admitted by the third defendant that the report to the ACA was not lodged by the 'Lembaga Pengarah' in Malay or 'the Board of Directors' in English;

(b) there was no 'keraguan berhubung dengan pemberian kontrak ... bernilai kira-kira RM55 juta' in Malay or 'doubt concerning the awarding of the contract ... valued at about approximately RM55 million' as the 'Rundingan terus 1/2002' in Malay or the 'Direct Negotiation 1/2002' in English was executed by the third defendant himself;

(c) the insinuation that the 'Lembaga Pengarah tidak berpuas hati dengan tindakan pengurusan' in Malay or 'the Board of Directors was not

satisfied with the action of the Management' in English is false as the third defendant himself denied any involvement of LKIM's Board of Directors;

(d) the imputation that 'pengurusan ... bukan saja dilihat tidak mengikut prosedur tetapi juga menyebabkan pembaziran' in Malay or 'Management ... not only was seen to have not complied with procedures but has also resulted in wastage' in English is false as the procedure was determined by the Treasury and the LKIM Management was only tasked to implement the procedure and also the contracts;

(e) the imputations that 'peruntukan kewangan LKIM dibelanjakan secara tidak berhemah dan tidak mengikut peraturan' in Malay or 'the financial allocations of LKIM were utilised carelessly and not in accordance with procedurs' in English are false as the contract prices were negotiated on the Treasury's instructions and the final figures were also approved by the Treasury. The awarding of the contracts by direct negotiation was determined by the Treasury at the outset;

(f) the allegation and imputation that the 'pengurusan tidak memaklumkan keputusan memberikan kontrak pembinaan kompleks dan kerja-kerja berkaitan kepada sebuah syarikat secara rundingan terus' in Malay and the 'Management did not inform (the Board of Directors of its decision to award the contract for the construction of the complex and the related works to a company vide direct negotiation' in English are false as the third defendant himself was deeply involved both in the 'Rundingan Terus 1/2002' in Malay or 'Direct Negotiation 1/2002' in English and 'Rundingan Terus 1/2006' in Malay or 'Direct Negotiation 1/2006' in English;

(g) the insinuations that 'bangunan kompleks ... yang ... dibina ... dengan kos RM29 juta tidak dapat digunakan kerana jeti pendataran terletak kira-kira 10 meter dari laut' in Malay or 'the building of the Complex ... that ... was built at a cost of RM29 million could not be used because the landing jetty was situated about 10 meters from the sea' in English are false. Firstly, at the time of publication, the main complex had not been commissioned yet as the access road was still under construction and, secondly, according to the testimony of Dato' Mustafa Ahmad ('DW5') the jetty was not only fully operational for the purpose for which it was constructed, it was being used to berth much bigger and deeper draught deep-sea fishing vessels;

(h) there was no 'syarikat sama diberikan kontrak mengorek pasir bagi membolehkan air laut memasuki kawasan jeti' in Malay or 'same company that was given the contract to dredge the sand (from the river bed) in order to enable the sea water to enter the jetty area' in English. It was a mere concoction; and

(i) the imputation of bribery and abuse of power in the statement involving the Direct Negotiation 1/2006 which reads as follows:

> Syarikat sama juga dikatakan mendapat kontrak bernilai RM 17.8 juta bagi membina jalan masuk sepanjang 1.8 kilometer ke kompleks itu dan nilai kontrak itu juga dikatakan jauh lebih tinggi' in Malay or 'The same company was also said to have obtained a contract valued at RM 17.8 million to construct an access road 1.8 kilometers long to the complex and the value of the contract was said to be very much higher (than normal)' in English is false as it was done with the blessing of the then Prime Minister and, more importantly, the contract was executed by the third defendant himself for and on behalf of the Government.

[234] Therefore, the court agreed with and accepted the submissions of the plaintiff that by virtue of the matters set out above, the third defendant was actuated by malice in the publication of the defamatory statements against the plaintiff.

[235] Be that as it may, it is trite law that the plaintiff need not have to prove malice on the part of the defendants unless and until the court rules that the words were published on a privilege occasion.

[236] This is because in the tort of defamation the law implies malice from the mere act of the defendant in publishing a defamatory matter.

[237] In *Adam v Ward* [1917] AC 309 Lord Finley LC said at p 318 as follows:

> From the mere publication of defamatory matter malice is implied, unless the publication was on what is termed a privilege occasion.

[238] Malice is not only provable by extrinsic evidence; it may be 'inferred from the terms of the alleged libel itself' (see *Thomas v Bradbury, Agnew & Co, Limited, and another* [1906] 2 KB 627).

[239] Reverting back to the instant case, in my judgment, in the present case, after the first and second defendants failed to obtain the comments of the plaintiff, they published the words complained of in the impugned article without considering or caring whether they were true or not. They were indifferent to the truth of the words complained of. They did not bother to even check the veracity or the truth of the words complained of before they published them in the impugned article. They did not practise responsible journalism in reporting the words complained of in the impugned article in their newspaper, the *Harian Metro*.

[240] In that sense, they have acted recklessly in publishing the words complained of in the impugned article.

[241] In *Clark v Molyneux* (1877) 3 QBD 237 at p 247, Brett LJ said as follows:

> If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes henceforth that he was malicious, that he did do a wrong thing for some wrong motives. So, if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that he does not know to be true, and he has stated it whether it is true, or not recklessly, by reason of his anger or other motive, the jury may infer that he used the occasions, not for reason which justified it, but for gratification of his anger or other indirect motive.

[242] Therefore, the court agreed with and accepted the submissions of the plaintiff's learned counsel that several questions might be asked in the instant case. These questions are as follows:

(1) Did the defendants honestly believe that it was LKIM's own Board of Directors which lodged the report to the ACA against its own DG?

(2) Did the defendants honestly believe that the report to the ACA was lodged based simply on suspicion?

(3) Is it true that the words complained of were written and published without sighting or having possession of or having the benefit of the report lodged by the third defendant to the ACA?

(4) Did the defendants honestly believe that all the contracts were awarded to the same contractor, namely, Pembinaan Zakaria Salleh, without the knowledge of the Treasury?

(5) Did the defendants honestly believe that the Government funds for the preparation of the project site costing RM8 miliion, the construction of the main complex costing RM26 million and the construction of the access road costing 17.8 million were expended by LKIM without the knowledge of the Treasury?

(6) Did the defendants honestly believe that the plan for the proposed jetty to be built 10 metres inland was not approved by the relevant authority ie the PWD?

(7) Is it the role of the first and second defendants to render assistance to a complainant to move the ACA to investigate the complaint, by declassifying the document?

(8) Did the defendants honestly believe that the Management headed by a career officer could bypass the Treasury and award contracts by way of direct negotiation?

(9) Did the defendants honestly believe that the Management was capable of allowing a complex worth RM29 million to become a white elephant right under the noses of the Treasury representatives who are members of LKIM's Board of Directors?

(10) Did the defendants honestly know that at all material times the Lembaga did not know anything about the contract for the preparation of the site, the contract for the contruction of the main complex and the contract for the construction of the access road? and

(11) Did the defendants honestly believe that the Management of LKIM could award the RM17.8 million contract for the construction and completion of the access road stretching 1.8 kilometers without the approval of the Treasury?

[243] Having considered the evidence adduced before the court, and the submissions of the parties, the court found that the defendants were actuated by malice because all the answers to the above questions are in the negative.

[244] In *Smith v Streatfeild and others* [1913] 3 KB 764, Bankes J observed as follows at pp 769–770:

> The principle upon which the law of qualified privilege rests is, I think, this: that where words are published which are both false and defamatory the law presumes malice on the part of the person who publishes them ...
>
> Qualified privilege is a defence only to the extent that it throws on the plaintiff the burden of proving express malice. Directly the plaintiff succeeds in doing this the defence vanishes, and it becomes immaterial that the publication was on a privilege occasion.

[245] The defendants have cited several cases in support of their contention that the words complained of were published on an occasion of qualified privilege.

[246] However, in my judgment all the cases cited by them are distinguishable on the following grounds:

(a) para 16.02 of *Duncan and Neill on Defamation*, 3rd Ed, states the law that qualified privilege will be lost if it is shown that the defendant was actuated by malice in publishing the words complained of and the paragraph cites *Egger v Viscount Chelmsford and others* [1965] 1 QB 248 as the authority for the proposition of law. Since the third defendant in the present case was actuated by malice, that case does not apply to the third defendant;

(b) in *Halim bin Arsyat v Sistem Televisyen Malaysia Bhd & Ors* [2001] 6 MLJ 353, the Malacca High Court held that the defence of qualified privilege was available only if the statement was made honestly and

without any indirect or improper motive and it depended on the honesty of purpose with which the defamatory statement was made. From the third defendant's testimony, it has been shown that the statements in the article were false and he knew it. Thus, in the circumstances, those statements not only were not made honestly and were in fact made with indirect or improper motive, this improper motive renders the purpose of the publication as dishonest. Hence, the third defendant cannot rely on that case;

(c) in *Tony Pua Kiam Wee v Syarikat Bekalan Air Selangor Sdn Bhd* (unreported), the Court of Appeal observed as follows:

> The important consideration is not the truth of the statements, but whether the appellant honestly believed in the truth of impugned words. In this respect, whether he genuinely believed in the truth of the impugned words, would, in turn, depend on the source for the statements issued by the appellant.

(d) in the instant case, the sources of the statements were the report and the third defendant. From the evidence adduced, the report is false and the third defendant was lying all the way. Therefore, there was no truth in the statements;

(e) *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127 ('*Reynolds*') is distinguishable on facts. In that case the House of Lords held that the common law should not develop a new subject matter category of qualified privilege whereby the publication of all political information would attract qualified privilege whatever the circumstances, since that would fail to provide adequate protection for reputation. In dismissing the appeal, the House of Lords held that in the circumstances the publication was not one which should in the public interest be protected by privilege in the absence of proof of malice;

(f) in *Reynolds* Lord Bingham of Cornhill CJ postulated the need for a defendant to satisfy the following three tests in order to succeed on the defence of qualified privilege. The first was described as the 'duty test', the second as the 'interest test' and the third as the 'circumstantial test'. In my considered view, the defendants in the instant case failed to meet all the three tests for the following reasons:

(i) the 'duty test' : Was the second defendant as the publisher under a legal, moral or social duty to the readers of the *Harian Metro* to (i) publish the contents of the ACA report and thereby give assistance to the third defendant ie the complainant, to expose to the whole wide world that the ACA was not up to their task in investigating his charges: *berlaku penyelewengan ketara dan salah guna kuasa telah dilakukan oleh Ketua Pengarah LKIM YH Dato'*

Annas bin Khatib Jaafar; and to (ii) declassify the complaint from the third defendant to the ACA?

(ii) the 'interest test': Did those to whom the material was published have an interest to receive the contents of the complainant's report to the ACA and did they censure the third defendant's act in declassifying the confidential report?

(iii) the 'circumstantial test': Were the nature, status and source of the material (the ACA report and its originator ie the third defendant) and the circumstances of the publication, such that the publication should in the public interest be protected in the absence of proof of express malice?

(g) because all the answers to the three tests are in the negative.

[247] In criminal law, where there is a publication containing false news, there is a presumption that the accused maliciously published the said false news. Under sub-s (2) of s 8A of the Printing Presses and Publications Act 1984, malice shall be presumed in the absence of evidence showing that prior to the publication the accused took reasonable measures to verify the truth of the news. In the instant case, in my considered view, it is manifestly clear, based on the evidence adduced by the parties before the court, that the words complained of were not the fruit of an investigative reporting on the part of the first and second defendants.

[248] This view is consistent with the view held by the Federal Court in *Lim Guan Eng v Public Prosecutor* [2000] 2 MLJ 577. Under that section, it is no defence to say that the matters were reported in a balanced, fair and responsible manner or as pleaded by the third defendant that he was entitled to make fair comments on matters pertaining to LKIM's investments which were of public interest.

[249] The malice essential to support the action is an intention to injure the plaintiff. Such intention will be inferred on proof that the words were calculated to produce actual damage, and that the defendant knew that they were false when the defendant published them, or the defendant was reckless as to whether they were false or not (see *Shapiro v La Morta* [1923] All ER Rep 378).

[250] In *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390; [1990] 1 CLJ 583; [1990] 3 CLJ Rep 691, there were four defendants all connected with the article published in the Far Eastern Economic Review of 17 December, 1987. The first defendant was the editor, the second defendant was the author of the article entitled 'New Light on detention' whilst the third and fourth defendants were the publisher and the printer, respectively. The

defence of fair comment failed for want of merit and sufficient substratum of facts on which to base the comment.

[251] In dealing with express malice, LP Thean J said that if express malice was proved against the editor and the author of the article, then the publishers would be liable vicariously on the basis of respondent superior. The learned judge was persuaded to hold in that manner by the following observations of Lord Denning MR in *Egger v Viscount Chelmsford and others* [1965] 1 QB 248 at p 265:

> A defendant is only affected by express malice if he himself was actuated by it: or if his servant or agent concerned in the publication was actuated by malice in the course of his employment.

[252] The learned judge in *Lee Kuan Yew v Derek Gwyn Davies*, considered first the question of express malice as regards the editor and the author together. As the editor, he would have considerable say on the content of the article or whether any part thereof should be published. Both of them were in the employment of the publisher. In conclusion, on the materials before him, LP Thean J found that the editor and the author were actuated by express malice.

[253] Accordingly, the publisher was affected by the express malice of the editor and the author. Hence, he found the publisher vicariously liable.

[254] Reverting back to the instant case, in my considered view, the third defendant was rubbing salt into the plaintiff's wound when in his defence he ventured further from the scope of the words complained of by adding further imputations of corrupt practices, misappropriation of funds and an abuse of power by the plaintiff in the following paragraphs in his defence:

> 12.4 The acquisition of the 5-storey building in Kota Baru was done without the requisite approval by LKIM's Board of Directors. Further, the advance payment of RM 445,000.00 made by LKIM was forfeited because the acquisition was not completed. The public funds had been wasted.
>
> 12.5 The intention to build a complex in Kuala Selangor with a 3-star hotel is questionable in an area where a state government-run hotel De Palma Inn in Kuala Selangor has been experiencing poor business.

[255] The inclusion of the two futher paragraphs added additional stings directly thrown at the plaintiff and, in my judgment, the third defendant was clearly actuated by malice and, therefore, it automatically demolished his averments in para 7 of his defence:

> (12) that the article complained of was not written or published by the third Defendant; and

(13) In any event the third Defendant denies any reference, express or otherwise, to the Plaintiff.

[256] Subparagraph 12.4 of the third defendant's defence had been proved to be false during his cross-examination, when he identified the signatures which appeared on P62 in Bundle 'I', *Borang 14A Pindahmilik Tanah*, which were affixed by him as the Chairman of LKIM and the representative of Square Point Management Sdn Bhd, the registered owner of the five storey building, referred to therein.

[257] Subparagraph 12.5 of the third defendant's defence was also proved to be false because the matter referred to therein was 'Cadangan Pembinaan Kompleks Pendaratan Ikan LKIM Kuala Selangor' which was handled by the Ministry of Finance and the Ministry of Agriculture and Agro-based Industry as shown in the documents in Bundle 'I', pp 54–63, in particular, D3(15)–D3(18).

[258] The evidence adduced before the court showed that the project did not include any hotel. It was, therefore, the third defendant's own concoction.

[259] The court noted that at the conclusion of the trial, the third defendant had submitted that he had made no imputations of corruption, bribery, misappropriation of funds and abuse of power against the plaintiff because he was solely concerned about wastage of government funds and he had also suspected that the procedures may not have been complied with in the awarding of certain contracts. Hence, the third defendant lodged his report and the report lodged by him against the plaintiff to the ACA is the backbone of his defence.

[260] In support of his plea of justification, the third defendant has pleaded as follows in sub-para 9.3 of his defence:

9.3 The third defendant lodged a report with the Anti-Corruption Agency by a letter dated 6.2.2007 and will rely on the contents of the same.

[261] The court noted that the contents of the third defendant's report highlighted the following matters:

PENYELEWENGAN DAN SALAH GUNA RUNDINGAN TERUS 1/2006 MEMBINA DAN MENYIAPKAN JALAN MASUK KE KOMPLEKS LKIM (BARU) KUALA KEDAH

.....

Adalah dengan segala hormatnya saya ingin melaporkan secara rasmi kepada pihak Y. Bhg Datuk Seri berhubung dengan perkara di atas yang pada pengamatan saya

berlaku penyelewengan ketara dan salah guna kuasa telah dilakukan oleh Ketua Pengarah LKIM Y. H. Dato' Annas bin Khatib Jaafar.

[262] Nevertheless, the court rejected the third defendant's submissions.

[263] My reasons are as follows.

[264] In my considered view, the above heading and opening paragraph of his report serve to demolish the third defendant's plea of justification and any attempt to down play the imputations of guilt thrown by the third defendant against the plaintiff ought to fail.

[265] On general defences, the third defendant has pleaded as follows in para 15 of his defence:

15. The third defendant will rely on, inter alia, the letter dated 6.2.2007 and other relevant documents at the trial of this action.

[266] Apparently, whilst the letter referred to therein points to the report he lodged with the ACA, the relevant documents refer essentially to the common bundle of documents between the plaintiff and the third defendant, Vol 1, marked Bundle 'F' and Vol 2, marked 'G'.

[267] The court also noted that in the meantime, the solicitors for the first and second defendants had served on the plaintiff their written submissions together with their bundles of authorities in three volumes. In Vol II behind Tab 27, there is a law report on the case of *Dato' Annas bin Khatib Jaafar v The New Straits Times Press (M) Bhd & Ors* [2013] 10 MLJ 640; [2013] 4 CLJ 96. Subparagraph (v) at p 648 (MLJ); p 105 (CLJ) of the judgment of the High Court, reads as follows:

(v) Additionally, the contents of the NST report are substantially a regurgitation of the letter of complaint/report to the ACA.

[268] Hence, it is not only essential but crucial to read the words complained of and the third defendant's report to the ACA together in order to obtain the right perspective.

[269] With regard to the issue of publication, the court noted that the expunged report contains statements made by the third defendant to the first and second defendants. Since the third defendant did not dispute the contents of the expunged report, it follows, that the report was his report. Since the first and second defendants have admitted publication of the contensts of the expunged report by the third defendant to them, the third defendant's denial is at odds with the admission of the first and second defendants.

[270] The main argument of the third defendant is as follows.

[271] The third defendant relied on his pleas of justification, qualified privilege and fair comment. He argued that he had in his official capacity lodged a report to the ACA using the letterhead of LKIM because he was concerned about the wastage of government funds as well as he had suspected that the procedures might not have been complied with in the awarding of certain contracts. This was the foundation of the third defendant's case. Nevertheless, based on the evidence adduced by the third defendant himself, the foundation of the third defendant's case collapsed towards the end of the trial when the third defendant unequivocally testified as follows:

(a) the report to the ACA was lodged by him not in his official capacity but in his personal capacity; and

(b) the letterhead of LKIM was misused by him.

[272] The court noted that, thereafter, the newspapers reported on the matter.

[273] It was true that the newspapers reported the matter as set out in the report to the ACA.

[274] It was on this basis that in the case against The New Straits Times Press (M) Bhd, the learned High Court judge concluded that the article published in *The New Straits Times* newspaper was the regurgitation of the report.

[275] However, in the instant case, the following matters were crystal clear to this court:

(a) the third defendant was concerned about the wastage of government funds because he was the one who had, together with the same contractor, executed the contracts;

(b) the procedures for the award of the contracts were dictated by the Treasury, so the suspicions entertained by the third defendant and the accusations levelled at the Management of LKIM headed by none other than the plaintiff as the DG of LKIM were nothing but lies; and

(c) the truth was that the procedures were complied with by the Management of LKIM headed by the plaintiff in accordance with the directive from the Treasury.

[276] In my judgment, the plaintiff's case passes the tests and approaches laid down in the following cases and text book authority on the considerations of what are the characteristics of a defamatory statement cited by the third defendant:

(a) *Syed Husin Ali v Sharikat Pencetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56;

(b) *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393;

(c) *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 461;

(d) *Mark Ignatius Uttley @ Mark Ostyn v Wong Kam Hor & Anor* [2002] 4 MLJ 371; [2002] 8 CLJ 628;

(e) *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492; [2010] 5 CLJ 301;

(f) *Law of Torts* by JGM Tyas; and

(g) *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390; [1990] 1 CLJ 583; [1990] 3 CLJ Rep 691.

[277] My reasons are as follows.

[278] The words complained of have the tendency to excite against the plaintiff the adverse opinions of others, although no one believed them to be true and the words complained of also tend to lower the plaintiff in the estimation of right-thinking members of society generally as this was an attack upon the moral character of the plaintiff as the Head of the Management of LKIM. This is because the third defendant has attributed to the plaintiff the crime of bribery and dishonesty in the misappropriation of government funds and in the awarding of the contracts to the same contractor by way of direct negotiation when the same contractor did not possess any special expertise.

[279] The third defendant has relied on the Euro 10m corporate guarantee fiasco to justify his lodging the report against the plaintiff to the ACA about his suspicions in the awarding of the RM55m worth of LKIM contracts by the plaintiff. However, the court noted that the Euro 10m corporate guarantee fiasco had implicated the third defendant. This is because based on the evidence adduced by the plaintiff, the scam was exposed when the notice of the registration of the corporate guarantee was issued by Bank Negara Malaysia to LKIM and this had caused some members of the board of Majuikan (excluding its chairman) to lodge a police report against the alleged forgeries of their signatures.

[280] The High Court had allowed the bank's claim for the recovery of the loan against Majuikan. However, as testified by the third defendant himself, Majuikan's appeal against the decision of the High Court was allowed by the Court of Appeal on the ground that the signatures of the Directors of Majuikan

were forged. Thus, the police report had saved Majuikan from being liable to the bank on the corporate guarantee purportedly issued by Majuikan. There was a press report captioned 'Majuikan dilapor ke BPR' in the *Berita Harian* of 12 April 2007 (common bundle of documents, Vol 2, marked 'C') on the matter.

[281] The third defendant had, therefore, resorted to creating a lie against the plaintiff concerning the awarding of the RM55m worth of LKIM contracts which is wholly uncalled for. There was, absolutely, no justification for him to have done that to the plaintiff.

[282] The third defendant has also chosen not to traverse the plaintiff's averments that the words complained of are false.

[283] The third defendant was the last litigant to take the stand after the plaintiff, the first defendant and the second defendant. By this time he already knew of the evidence of all the witnesses who were called against him and for him. He heard with his own ears the evidence of the witnesses that all his imputations of guilt against the plaintiff actually turned against him. He also saw from his own eyes how the documents which he had tendered through his former solicitors, namely, Messrs Rajes Hisham Rahim & Gopal, served as compelling evidence in actual fact to show that all the allegations both in the words complained of and in his report were not only false but that he himself was deeply involved in the execution of the RM55m worth of LKIM contracts.

[284] With that compelling evidence, the court expected the third defendant to be more aggressive in his witness statement compared to his pleaded defence because his witness statement had undergone an overhaul. Alas, it was not to be. The court found his witness statement ('D58') which consisted of only six questions and answers including the introduction to be rather somber and subdued.

[285] The court also found that the third defendant's answers were insincere and lacked forthrightness.

[286] My reasons are as follows:

(a) the writing and publication of the report were a smoke screen to divert the attention of the public and the authorities from investigating the police report that was lodged by some members of the Board of Directors of Majuikan over the ultra vires and fraudulent offshore loan granted by the bank to MSB based on a corporate guarantee purportedly given by Majuikan without the knowledge of the Management of LKIM as reported by the press on 12 April 2007;

(b) the LKIM Complex in Kuala Kedah in Kedah and the inland jetty referred to in the report were implemented in the year 2002 and the third defendant knew that these implementations could not have been attributed to the plaintiff as the plaintiff was not yet the DG of LKIM at that point in time;

(c) there was no contract for the dredging of the sand of the river bed to enable the sea water to reach the jetty area and neither was there a need to dredge the sand of the river bed to enable the sea water to reach the jetty;

(d) in writing, printing and publishing that the same company obtained the LKIM contract worth RM17.8m to build an access road to the LKIM Complex in Kuala Kedah 1.8km long and the value of the contract was also far too high, the third defendant was in fact challenging the decisions of the previous two Right Honourable Prime Ministers of Malaysia and also the Ministry of Finance; and

(e) at all material times, the third defendant was aware that the contract was awarded with the approval of the higher authorities and that he himself executed the Direct Negotiation No 1/2006, for and on behalf of the Government of Malaysia.

[287] On his report to the ACA, short of saying that the impugned article was a regurgitation of his report to the ACA, he merely said that the impugned article had dealt with a report that he had lodged with the ACA.

[288] Although the contents of his report, by this time, were already before the court, and it has been established that the report was his personal report that was lodged, independently, of LKIM, yet when asked the reason for lodging the report he merely said as follows:

> A4. Because of suspicions of some contracts which involve use of public funds. Therefore, as Chairman of the board, I lodged the report.

[289] Again, although by this time, the third defendant had admitted that he was the one who had signed the contract known as 'Rundingan Terus 1/2002' with the same company ie syarikat Pembinaan Zakaria Salleh Sdn Bhd, in his capacity as the Chairman of LKIM, for and on behalf of the Government of Malaysia, he merely said, in part, as follows when giving his reason as to why he had entertained suspicions about the contracts concerned:

> A5. For example, three direct negotiations contracts worth approximately RM55 million were awarded to the same company ...

[290] The above question was put to the third defendant by his learned counsel within a few minutes after Dato' Mustafa bin Ahmad ('DW5') left the

witness box from where DW5 testified that the jetty was not only fully operational but was being used to berth deep sea vessels about three in number at any one given time and yet the third defendant gave the following answer:

> A5. ... but resulted in the building of fisheries complex jetty that was useless as it was 10 metres away from the sea ...

[291] Although the words complained of made no mention of it, and so was not part of the plaintiff's claim, yet it is pleaded in the third defendant's defence and in the spirit of this defence, the third defendant included it in his answer.

[292] He said as follows:

> A5. ... On another occasion, advance payments by LKIM for the acquisition of a building were forfeited as the acquisition was delayed. This resulted in a waste of public funds totalling RM445,000.

[293] In my judgment, since the plaintiff was the respondent named in the report, when the report is read together with the words complained of, the plaintiff was also inevitably the person referred to therein.

[294] During cross-examination, the third defendant agreed that as the plaintiff was appointed the DG of LKIM on or about 27 October 2004, he could not be implicated in any project launched before that date.

[295] Nevertheless, the third defendant reiterated that he relied on the contents of his report to the ACA dated 6 February 2007 to justify his publication of the contents of his report to the ACA to DW1.

[296] On whether he could still remember that two months later ie on 6 April 2007, he had gone to the press and talked about the report to a journalist by the name of Wan Hazmir bin Bakar, he replied in the affirmative. Thus the court noted that this answer of the third defendant is at variance with the earlier statement made by Wan Hazmir bin Bakar in 'D35'. At p 6 in answer to Q8 Wan Hazmir bin Bakar said therein as follows:

> Pada 6.4.2007, saya telah menerima maklumat yang pada zahirnya adalah kredibel dari sumber yang bereputasi iaitu Pengurusi Lembaga Kemajuan Ikan Malaysia (LKIM), iaitu En. Adam Abdul Hamid, Defendan Ke-3 dalam tindakan ini, bahawa satu laporan telah dibuat terhadap Plaintif dengan Badan Pencegah Rasuah Malaysia (BPR) oleh Pengarah LKIM pada 6.2.2007. Laporan BPR tersebut berkenaan pemberian kontrak oleh LKIM untuk membina Kompleks LKIM Kuala Kedah di Kampong Geluncur, Kedah dengan anggaran kos sebanyak RM55 juta, yang didakwa dipersoalkan dan gagal mematuhi prosedur pemberian kontrak. Laporan BPR ini dapat dilihat dalam 1CBD7-10

[297] The variation is more prominent when the third defendant confirmed that on 6 April 2007 he went to the press and there he was attended to by Wan Hazmir bin Bakar. During this press interview the contents of his report to the ACA were released to Wan Hazmir bin Bakar.

[298] During his cross-examination, the third defendant also confirmed that the members of the board at the material time consisted of the following persons:

(a) a Chairman;

(b) a DG;

(c) a representative from the Ministry of Agriculture;

(d) a representative from the Treasury;

(e) a representative from the Fisheries Dept;

(f) a representative from the Economic Planning Unit ('EPU');

(g) a representative from the Federal Agriculture Marketting Authority ('FAMA'); and

(h) not more than five members from those who have shown wide knowledge in matters of the fisheries industry or in marketing, financial or administration of the fisheries industry.

[299] The third defendant admitted that before he lodged the report to the ACA on 6 February 2007 and before he went to the press on 6 April 2007, he did not obtain the consensus or the resolution from the members of the LKIM Board including the representative from the Treasury to do so and that he had lodged the report to the ACA without the knowledge of the rest of the members of the board.

[300] Nevertheless, the third defendant denied that he had abused his power as the Chairman of LKIM by using LKIM's letter-head to lodge his report to the ACA. The third defendant also denied that he had abused his power when he also signed this letter as the Chairman of LKIM because the truth of the matter was that he had lodged his report on his own and not in his official capacity as the Chairman of LKIM.

[301] The third defendant was then shown the following heading of his report to the ACA:

> PENYELEWENGAN DAN SALAH GUNA KUASA RUNDINGAN TERUS 1/2006 MEMBINA DAN MENYIAPKAN JALAN MASUK KE KOMPLEKS (BARU) KUALA KEDAH.

[302] The third defendant confirmed that the contract for the construction and completion of the access road to the LKIM Complex was awarded through Direct Negotiation No 1/2006.

[303] The third defendant also confirmed that this direct negotiation was a wrong procedure and it was a misappropriation of funds and an abuse of power and that he still stood by these allegations.

[304] When shown p 011 of Bundle 'F' ie the 'Dokumen Kontrak untuk Cadangan Membina Dan Menyiap-kan Jalan Masuk Ke Kompleks LKIM Kuala Kedah No Kontrak: RUNDINGAN TERUS 1/2006', the third defendant confirmed that it was the 'RUNDINGAN TERUS 1/2006' that he had referred to in the heading of his report to the ACA.

[305] When shown p 015 of Bundle 'F' again and it was put to him that, that was the letter of acceptance issued by LKIM and the acceptance was given to Pembinaan Zakaria Salleh, the third defendant confirmed that it was.

[306] When shown p 020 from the same Bundle 'F', and it was put to him that the offer and acceptance was concluded by Zohari bin Zakaria, the Executive Director of Pembinaan Zakaria Salleh Sdn Bhd, who signed for and on behalf of Pembinaan Zakaria Salleh Sdn Bhd, he confirmed that it was. At the same time he also told the court that the said offer and acceptance was signed by him in his capacity as the Chairman of LKIM for and on behalf of the government.

[307] When shown 'P7' at p 202 from the same Bundle 'F' and it was put to him that, that was the 'Rundingan Terus 1/2006' which he had referred to in the heading of his report to the ACA, the third defendant agreed with the put question.

[308] When the third defendant was asked whether the reference No '1/2006' in the 'Rundingan Terus 1/2006' refered to the year '2006', he said 'Yes'. When he was further asked who had signed this 'Rundingan Terus 1/2006' for and on behalf of the government, he said he did.

[309] The third defendant's answer was also 'Yes' to the following question:

> So the heading of your ACA Report at page 007 marked P-2: 'PENYELEWENGAN DAN SALAH GUNA KUASA RUNDINGAN TERUS 1/2006 MEMBINA DAN MENYIAPKAN JALAN MASUK KE KOMPLEKS (BARU) KUALA KEDAH' was referring to the contract of your own execution?

[310] The third defendant was then referred to the following opening

paragraph of his report to the ACA ('P2'):

> Adalah dengan segala hormatnya saya ingin melaporkan secara rasmi kepada pihak Y Bhg Datuk Sri berhubung dengan perkara di atas (meaning *PENYELEWENGAN DAN SALAH GUNA KUASA RUNDINGAN TERUS 1/2006 MEMBINA DAN MENYIAPKAN JALAN MASUK KE KOMPLEKS LKIM (BARU)* KUALA KEDAH) yang pada pengamatan saya berlaku penyelewengan ketara dan salah guna kuasa telah dilakukan oleh Ketua Pengarah LKIM. Y.H. Dato' Annas binn Khatib Jaafar. (Emphasis added.)

[311] While he was looking at the above passages in his report (as set out above) as instructed by the plaintiff's learned counsel, the following question was put to him:

> You signed the Contract RUNDINGAN TERUS 1/2006 but here you reported to Datuk Sri Zulkifli bin Mat Noor that the plaintiff had committed misappropriation of funds and an abuse of power'. Is this ACA report true or false?

[312] He admitted to the obvious.

[313] The third defendant was then led to the following second paragraph of his report ('P2'):

> 2. Kompleks LKIM Kuala Kedah telah dibina oleh kontraktor Pembinaan Zakaria Salleh Sdn Bhd beralamat di 8, Taman Jaya, Jalan Langgar, 05460 Alor Setar, Kedah dengan harga RM26,564,222.61 secara Rundingan Terus 1/2002 dan diserahkan kepada LKIM Ibu Pejabat pada 18hb. Mei, 2006.

[314] The third defendant was then asked whether 'Rundingan Terus 1/2002' was a contract which took place in the year 2002. He said it was.

[315] He was next asked whether it was correct that the DG of LKIM at that point in time was not Dato' Annas bin Khatib Jaafar but Dato' Sheikh Ahmad bin Sheikh Long. He said that it was correct.

[316] The third defendant was then asked, but not before he was shown Bundle 'H' p 15, whether it was his signature which appears on the right hand side of the page. He not only answered favourably but he also admitted that he had executed it for and on behalf of the government.

[317] The third defendant also agreed that it was a contract that was entered into between the government and Syarikat Pembinaan Zakaria Salleh Sdn Bhd. This document was marked P59.

[318] To demonstrate that he was deeply involved in all the contracts which he had, falsely, attributed to the plaintiff, the third defendant was shown the

form of tender in Bundle 'H' at pp 16–18 which contained three amendments. He admitted signing the three amendments at p 18. He also testified that his signature was witnessed by the then DG of LKIM, namely, Dato' Sheikh Ahmad bin Sheikh Long.

[319] The third defendant also confirmed that as the Chairman of LKIM, he was also appointed the chairman of its subsidiary company, namely, Majuikan Sdn Bhd, and that as the Chairman of a GLC, he was not allowed to create a corporate guarantee for a private contractor to obtain an offshore loan in favour of a bank.

[320] The third defendant was then led to p 21 of Bundle 'H' which shows a *New Straits Times* report called 'Something 'fishy' in Majuikan's loan'. He was asked whether he was implicated in the creation of the corporate guarantee and that the corporate guarantee was registered with Bank Negara Malaysia. He said 'Yes'.

[321] Returning to the issue at hand, namely, the project for the construction and completion of the LKIM Complex in Kuala Kedah which costs about RM55m, the third defendant agreed to a suggestion that as in all projects, this project was divided into various stages of development as follows:

(a) first stage: site clearance costing RM8.3m (Bundle 'H' p 1, exh 'ID4');

(b) second stage: the construction of the main complex itself including the landing jetty for the fishing boats costing RM26,564,222 (Bundle 'H', p 5, exh 'ID9'); and

(c) third and final stage: the construction of the access road costing RM17.8m (Bundle 'H', p 10 exh (P29) also at (Bundle 'I', p 25, exh 'P29')

[322] The third defendant was asked to look at Bundle 'H', p 1, exh 'ID-4'. He was then asked when did the implementation of this project start, judging from the letter ie whether it was on 13 December 1999? He told the court that the project was started way back in 1999.

[323] The third defendant was then asked whether he had pleaded in para 3 of his defence that the plaintiff was appointed the DG on or about 27 October 2004 and yet contrary to his pleading he implicated the plaintiff in this project. He said 'Yes' meaning he agreed that he implicated the plaintiff in his report even though he knew that the plaintiff was not involved in the project at all.

[324] The third defendant was then led back to Bundle 'F' and to turn to 'F200' at p 200 for the initial project for the site preparation which was

completed by the contractor as follows:

Value of Contract	RM8,300,000
Date commenced	05/09/2000
Date completed	24/10/2001

[325] When the site for the construction of the LKIM Complex had been completed, the contractor proceeded with the construction of the Main LKIM Complex itself. So, in exh 'F200' in Bundle 'F' the third defendant was asked to look at Project No 1 as follows:

Value of Contract	RM26,564,222
Date commenced	28/07/2003

[326] The third defendant was asked whether the plaintiff was around at that point in time. His answer was in the negative.

[327] The third defendant was then asked to refer to Bundle 'I' and to turn to p 5, exh 'ID5' which was a letter written by the Special Adviser to the Prime Minister, namely, Tan Sri Ali Abul Hassan bin Sulaiman, dated 22 April 2002. The opening paragraph reads as follows:

> CADANGAN MEREKABENTUK, MEMBINA DAN MENYIAPKAN KOMPLEKS PERIKANAN LEMBAGA KEMAJUAN IKAN MALAYSIA (LKIM) DI KUALA KEDAH MELALUI RUNDINGAN TERUS.

[328] When he was asked the following question:

> Who determined that the contract should be by way of 'Rundingan Terus'?

[329] Without hesitation the third defendant told the court that it was the Treasury.

[330] The following opening paragraph was then read out to him:

> Dengan segala hormatnya saya merujuk kepada surat daripada syarikat Pembinaan Zakaria Salleh Sdn Bhd bertarikh 17 Mac, 2002 mengenai perkara di atas. Salinan tersebut ada di sertakan.

[331] The following question was then put to him:

> According to this letter, the contractor upon completion of the site for the LKIM Complex, by letter dated March 17, 2002 wrote to the then Prime Minister seeking a contract to design, construct and complete the LKIM Complex at Kuala Kedah. Do you agree?

[332] He said 'Yes'.

[333] The last paragraph of the letter which is para 6 was then read out to the third defendant as follows:

> 6. Dikemukakan untuk pertimbangan dan keputusan YAB Dato' Seri. Sekiranya bersetuju, saya akan meminta Kementerian Kewangan mengambil tindakan seterusnya.

[334] The court noted that as the addressee of the letter, and in response thereto, Dr Mahathir Mohamad, the Right Honourable Prime Minister at the material time, had minuted as follows:

> Tan Sri Ali,
>
> Bersetuju disokong pemberian kepada syarikat Zakaria. Dated 29 April, 2002.

[335] The third defendant was then asked to refer to the next page ie p 7 (exh 'ID33'), which was a letter dated May 6, 2002 that was written by Tan Sri Dato' Seri Ali Abul Hassan bin Sulaiman to the DG of the Treasury.

[336] The following para 4 of this letter was read out to the third defendant:

> 4. Bersama ini disertakan salinan keputusan YAB Perdana Menteri serta profil syarikat dan kertas cadangan mengenai perkara ini untuk tindakan Kementerian Kewangan seterusnya.

[337] The following question was then put to the third defendant:

> Looking at the subsequent correspondences at pages 9, 120, 12 and 13, the Project was implemented by LKIM under the direction and approval of the Ministry of Finance. Don't you agree?

[338] He said 'Yes'.

[339] When the following question was put to him:

> From time to time the Contractor sought direct approval from the Prime Minister. Such approval can be seen at page 19 Lampiran 'P-24'. Do you agree?

[340] He said he did.

[341] The following suggestion was also put to him:

> This was an application by the Contractor Pembinaan Zakaria Salleh Sdn Bhd. It was approved by the then Prime Minister when he minuted as follows:
>
> Saya tiada halangan jika pendekatan ini lebih baik dari segi mempercepatkan pembangunan Kompleks LKIM.
>
> Signed by Dato' Seri Abdullah Badawi on February 25, 2005. Do you agree?

[342] He said 'Yes'.

[343] The matters in point were set out at p 20. Item one was the access road to the complex. The third defendant was directed to refer to Bundle 'F' at pp 007–010 (P2) and, in particular, to para 9 at p 008 which reads as follows:

> 9. Apabila saya membangkitkan bahawa tender ini terlalu mahal dan membazirkan wang kerajaan di dalam Mesyuarat Ahli Jemaah Lembaga LKIM pada 21hb. Disember 2006, Ketua Pengarah Y. H. Dato' Annas b. Khatib Jaafar menjelaskan bahawa ada 'wahyu' dari Perbendaharaan dan beliau terpaksa melaksanakan.

[344] The following question was then put to him:

> *This* ('Saya tiada halangan jika pendekatan ini lebih baik dari segi mempercepatkan pembangunan Kompleks LKIM') *was the 'WAHYU' the plaintiff was talking about?* (Emphasis added).

[345] He answered that he agreed.

[346] He was shown a letter from the Ministry of Finance to LKIM in Bundle 'I' at p 21 (P25) which shows that following the 'WAHYU' the Ministry of Finance fixed the cost of the construction at RM18m. The third defendant did not dispute the contents of the letter.

[347] The third defendant was then reminded that the contract for the construction and completion of the access road was in fact signed by him as can be clearly seen in exh 'P7' at Bundle 'F' p 202. He agreed with this reminder.

[348] Concerning the publication of the impugned article at p 001 of Bundle 'F' (exh 'P3'), the third defendant was reminded that this was the publication of the impugned article in the *Harian Metro* dated 10 April 2007. The heading reads as follows:

> Siasat kontrak LKIM
>
> Lembaga pengarah lapor kepada BPR

[349] A question was then put to him that if the members of the board of directors had no pre-knowledge of his report to the ACA; and there was no consensus among the members, including the representatives from the Treasury, to lodge the report to the ACA, his report to the ACA could not be said to have been lodged by the Board of Directors of LKIM.

[350] The third defendant agreed with the put question.

[351] The following opening paragraph of the impugned article was then

drawn to his attention:

> PUTRAJAYA: Keraguan berhubung pemberian kontrak dan kerja pembinaan Kompleks Kemajuan Ikan Malaysia (LKIM) Kuala Kedah, Kedah bernilai kira-kira RM 55 juta membuatkan Lembaga Pengarah pertubuhan itu sendiri mengemukakan aduan kepada Badan Pencegah Rasuah (BPR).

[352] Upon reading the above passage and after going through various exhibits, the third defendant was then asked whether it could be said that the report was wrong. He said 'Yes'.

[353] When the third defendant was asked whether he would agree that since firstly, the project was launched in December 1999; secondly, the contracts were awarded by the Treasury; thirdly, the prices were determined by the Treasury; and fourthly, the method of awarding the contracts ie by 'Rundingan Terus', was decided by the Treasury, the impugned article was wrong (in stating otherwise), the third defendant agreed.

[354] The third defendant was then invited to examine the following para 2 of the impugned article:

> Pengerusi LKIM, Adam Abdul Hamid, berkata beliau membuat aduan itu kira-kira tiga bulan lalu kerana Lembaga pengarah tidak berpuas hati dengan tindakan pengurusan yang bukan saja dilihat tidak mengikut prosedur tetapi juga menyebabkan pembaziran.

[355] In relation to the above passage, the third defendant was asked whether in all honesty the following imputations were true:

(a) the board was not satisfied with the actions taken by the management;

(b) the Management of LKIM, which was headed by the plaintiff, who was the DG at that point in time ie on 10 April 10 2013, did not follow procedures; and

(c) the management had caused wastage (of government funds).

[356] He said they were not true.

[357] Concerning the third paragraph which reads as follows:

> Saya sendiri yang membuat aduan kepada BPR kerana saya tidak berpuas hati jika wang kerajaan dibelanjakan secara tidak berhemah dan berlaku pembaziran.

it was put to him that he had admitted that the report was his personal report. The third defendant said 'Yes'.

[358] In response to questions put to him, the third defendant also agreed to the following suggestions which were made to him:

(a) once the report dated 6 February 2007 was lodged by him with the ACA, it became a classified document;

(b) on 6 April 2007, he went to the press and he was attended to by Wan Hazmir bin Bakar; and

(c) in disclosing the contents of his report to the press, he had duly declassified his report to the ACA.

[359] Coming to the fourth paragraph of the impugned article which reads as follows:

> Saya berharap BPR akan membuat siasatan bagi memastikan peruntukan kewangan LKIM dibelanjakan secara berkhemah dan mengikut peraturan', katanya semalam.

the third defendant was reminded by the plaintiff's learned counsel that the relevant documents had shown that all the decisions were made by the Treasury and that LKIM was merely asked to implement and execute those decisions which had been made. It was then put to him that in the light of the documentary evidence which was adduced by the plaintiff and drawn to his attention during his cross-examination, he was actually challenging the decisions of the Treasury as well as the decisions of Dr Mahathir Mohamed, the previous Right Honourable Prime Minister, and Dato' Seri Haji Abdullah Badawi, who was the Right Honourable Prime Minister at the material time, the third defendant replied 'No'.

[360] Coming to the fifth paragraph which reads as follows:

> Keraguan timbul apabila pengurusan tidak memaklumkan keputusan memberikan kontrak pembinaan kompleks dan kerja-kerja berkaitan kepada sebuah syarikat secara rundingan terus walaupun pembinaan tidak membabitkan kepakaran khusus.

and after the above passage was read aloud to the third defendant, the third defendant was shown Bundle 'I' p 24 (exh P28) which was a self explanatory letter from the Ministry of Finance dated 3 March 2006, by the plaintiff's learned counsel.

[361] Based on his answers to the questions posed to him by learned counsel for the plaintiff, the court noted that the third defendant had agreed as follows:

(a) the proposed access road was to be awarded by way of direct negotiation;

(b) the contract price was RM17.8m;

(c) the contract was to be awarded to Pembinaan Zakaria Salleh Sdn Bhd;

(d) everything was decided by the Treasury; and

(e) according to Bundle 'I', at p 202 (exh P7), the form of tender was signed by him as the Chairman of LKIM, for and on behalf of the government.

[362] Therefore, it was crystal clear to the court, that the third defendant knew everything pertaining to the contracts, the manner in which they had been awarded and the exact reasons why they were awarded to the same contractor even though the same contractor was not shown to have possessed a special expertise which no other contractor possessed. And yet according to para 5 of the impugned article in the *Harian Metro*, he was quoted as saying as follows:

> Suspicion arose when the management failed to disclose the decision to award the contract and related works to a company employing Direct Negotiation, even though the construction did not require an expertise. (Bundle 'F', p. 001 (P-3)).

[363] In my judgment, this paragraph, for reasons as stated above, was a complete lie and was intended to deceive not only the ACA but also the readers of the *Harian Metro* by discrediting the plaintiff and by inducing the ACA and the readers of the *Harian Metro* to believe that it was the plaintiff who was guilty of corrupt practices by deliberately and fraudulently favouring Pembinaan Zakaria Salleh Sdn Bhd as the sole contractor to carry out the works under the contracts worth about RM55m.

[364] For the same reasons, the submissions of learned counsel for the first and second defendants and learned counsel for the third defendant that the impugned article had merely reported the suspicions expressed by the third defendant on the awarding of the contracts costing approximately RM55m to a single contractor, who did not posses any special expertise, as contained in his report were misconceived and devoid of any merit.

[365] The next paragraph is para 6 which reads as follows:

> Mengikut prosedur pemberian kontrak kerajaan, kaedah rundingan terus hanya diguna pakai apabila tiada syarikat lain memiliki kepakaran khusus bagi melaksanakan kerja pembinaan berkaitan.

[366] By saying this, and in the light of the evidence gathered from him, the court was of the considered view that the third defendant had lodged the false report at the expense of the plaintiff. Hence, the court found that the third defendant was actuated by malice in lodging the report. This was the only reasonable inference which the court could draw based on the glaring evidence against the third defendant, most of which comprised his own admissions to questions put to him by learned counsel for the plaintiff.

The next paragraph is para 7 which reads as follows:

> Lebih meragukan apabila bangunan kompleks di Kampung Geluncur itu yang siap dibina beberapa bulan lalu dengan kos RM29 juta tidak dapat digunakan kerana jeti pendaratan terletak kira-kira 10 meter dari laut.

[367] It was put to the third defendant that by this statement he had portrayed that the LKIM Complex was landlocked because the landing jetty was located far from the sea and that by doing that he had practised another deception on the ACA and the readers of the *Harian Metro*. The third defendant said 'Yes'.

[368] The next paragraph is para 8 of the impugned article in Bundle 'F' at p 001 which reads as follows:

> Berikutan itu, syarikat sama diberikan kontrak mengorek pasir bagi membolehkan air laut memasuki kawasan jeti tetapi caj RM100 bagi tiap-setiap meter padu pasir yang dikorek pula dikatakan melebihi kadar pernilaian Jabatan Kerja Raya (JKR), iaitu sekitar RM30.

[369] It was asked of the third defendant, whether in all honesty there was ever a contract to dredge the sand from the bed of Sungai Geluncur. He said 'No'.

[370] Hence, the court was satisfied that the plaintiff has proven beyond reasonable doubt that the allegation was clearly the third defendant's own concoction.

[371] The last paragraph is para 9 which reads as follows:

> Syarikat sama juga dikatakan mendapat kontrak bernilai RM17.8 juta bagi membina jalan masuk sepanjang 1.8 kilometer ke kompleks itu dan nilai kontrak itu juga dikatakan jauh lebih tinggi:-BH.

[372] The third defendant was reminded of the heading which reads as follows in English:

> MISAPPROPRIATION OF FUNDS AND ABUSE OF POWER DIRECT NEGOTIATION 1/2006 CONSTRUCTION AND COMPLETION OF ACCESS ROAD LKIM COMPLEX (NEW) KUALA KEDAH

and also para 6 of his report which reads as follows in English:

> 6. The same company, Pembinaan Zakaria Salleh Sdn Bhd, subsequently was also given the project to build and complete the access road to the LKIM Kompleks stretching 1.8 km Grade R4 by way of Direct Negotiation valued at RM18.7 million ...

[373] It was then put to him that the gist of the last paragraph of the impugned article as well as the heading of his report and para 6 of his report as reproduced above contained the same messages. He agreed with the put question.

[374] The third defendant was reminded that he was still being referred to Bundle 'F' and he was then asked to turn to p 201 (exh 'P30') and thereafter to p 202 (exh 'P7'). The third defendant was then referred to exh 'P30' which was the contract document for the proposed construction and completion of the access road to the LKIM Complex in Kuala Kedah which was the 'Rundingan Terus No. 1/2006' and his attention was then drawn to exh 'P7' which was the form of tender for the 'Rundingan Terus No. 1/2006'.

[375] The third defendant's attention was then drawn to his signature in the contract document. It was then put to him that the contract was signed between the very same company that he had complained of ie Pembinaan Zakaria Salleh Sdn Bhd, as the contractor, and he himself ie Haji Adam bin Abdul Hamid, as 'the Chairman of the Lembaga Kemajuan Ikan Malaysia For and On Behalf of the Government'.

[376] The third defendant admitted that it was his signature.

[377] The third defendant was then shown Bundle 'A' which is the bundle of pleadings which contained the third defendant's defence, in particular, sub-para 12.4 at p 81 which reads as follows:

> 12.4. The acquisition of the 5-storey building in Kota Baru was done without the requisite approval by LKIM's Board of Directors. Further, the advance payment of RM 445,000.00 made by LKIM was forfeited because the acquisition was not completed. Public funds had been wasted. (D-60)

[378] He was asked to confirm that the five storey building was in Bandar Kota Bharu. He said 'Yes'.

[379] The third defendant was then asked to refer to the 'Boucer Bayaran' in Malay or 'Payment Voucher' in English Bundle 'I', p 116 (P60). He confirmed that LKIM paid a sum of RM 455,000.00 as the 10% deposit and that the new LKIM Complex ('the property') was constructed on two pieces of land held under HSD 18245 PT No 167 and HSD 1825 PT No 168.

[380] The third defendant was then referred to the report and valuation prepared by the valuation officer from the Ministry of Finance at p 91 of Bundle I ('ID61').

[381] The following recommendation at p 99 was then read out to him:

> Setelah mengambil kira faktor-faktor di atas, jabatan ini berpendapat harga yang ditawarkan sebenarnya *RM4,819,200.00* boleh diterima sebagai nilai pasaran yang berpatutan dan munasabah bagi maksud pembelian. Pihak tuan dinasihatkan memulakan rundingan pada harga *RM4.5 juta*. (Emphasis added.)

[382] When asked whether the recommendation at p 99 was correct, he agreed that it was correct. He was also shown the sale and purchase agreement (P3) for the acquisition of the property.

[383] The third defendant was asked whether he agreed that it was upon the recommendation of the the valuation officer from the Ministry of Finance that a sale and purchase agreement between Square Point Properties Sdn Bhd and LKIM was signed on 17 January 2007. He agreed that it was so.

[384] It is pertinent to note that in sub-para 12.4 of his defence, the third defendant had pleaded as follows:

> 12.4. The acquisition of the 5-storey building in Kota Baru was done without the requisite approval by LKIM's Board of Directors. Further, the advance payment of RM 445,000.00 made by LKIM was forfeited because the acquisition were not completed. Public funds had been wasted.

[385] The third defendant was then asked to turn to p 112 (P62). When he was asked whether he could recognize the document, he said it was Form 14A which was the form for the transfer of land under the National Land Code.

[386] Next he was asked to look at the next page which was p 113. When he was asked to look at the signature on p 113, he said he recognised that it was his signature.

[387] The court noted that before his cross-examination on this issue, the third defendant had stated in his witness statement as follows:

> On another occasion, advance payments by LKIM for acquisition of a building were forfeited as the acquisition was delayed. This resulted in a waste of public funds totalling RM445,000.00.

[388] When the third defendant was referred again to his examination-in-chief where in answer to question 7, he had said that the deposit for the purchase of a building by LKIM in Kelantan was forfeited because of the delay by LKIM in completing the acquisition and it was put to him as follows:

(a) the old LKIM building in Kota Bharu ('the old building') has been given to the Fishermen Association of the State of Kelantan;

(b) the old building was given away when LKIM moved into the newly acquired five storey building; and

(c) this newly acquired five storey building is now the registered property of LKIM;

the third defendant agreed with the put question.

[389] These were amongst the issues he had raised in his report to the ACA and which were reported in the impugned article. The court noted that each and every one of them was a lie.

[390] The court shall now examine the testimony of the second defendant's witness, namely, Dato' Mustafa bin Ahmad ('DW5'). DW5 had admitted that he was at all material times the deputy to Dato' Annas bin Khatib Jaafar and that he had later succeeded the plaintiff as the new DG of LKIM.

[391] His testimony is as follows:

(a) he admitted that as the Deputy DG, he was the second man in the Management of LKIM. In other words, he was in the team of the Management of LKIM;

(b) he also admitted that as the DG of LKIM, he, too, was the Registrar of the State Fishermen Associations;

(c) when asked what was the approximate number of the members of the Fishermen Associations throughout Malaysia at that time, he said 50,000 which according to the plaintiff was very far below the actual number;

(d) as the DG of LKIM and as the head of the management he also admitted that he looked after the welfare of the fishermen and that he used to send his officers to attend all the annual general meetings of the State Fishermen Associations;

(e) as the DG of LKIM, his office organised from time to time all the meetings of the State Fishermen Associations at the national level where he had the occasion to meet those who attended the national level meetings and thus as the DG of LKIM and the Registrar of the State Fishermen Associations, he had a close relationship with the fishermen who are members of the State Fishermen Associations, they know him as the Head of the Management of LKIM;

(f) he also admitted that the fishermen who are members of the State Fishermen Associations know that the Management of LKIM and the DG of LKIM refer to the same person, namely, Dato' Mustafa bin Ahmad ie himself;

(g) he further admitted that they know Dato' Mustafa bin Ahmad ('DW5') as the Head of the Management of LKIM because all the fishermen enjoy the diesel subsidies which are provided by LKIM;

(h) he also admitted that as members of the State Fishermen Associations, they knew that, at the material time, the management of LKIM and the DG of LKIM referred to the same person, namely, Dato' Annas bin Khatib Jaafar ie the plaintiff;

(i) when DW5 was referred to his examination-in-chief where in answer to question 5, he had said that the Kuala Kedah jetty was a failure because it was found to be 10 metres away from the sea and it was put to him that the jetty was on the bank of a river and that this river was navigable not only by fishing boats but also by trawlers he agreed; and

(j) he also ventured to inform the court that the jetty was being used to berth a number of deep sea fishing boats at any one time.

The defendants' refusal to withdraw the libel, to tender an apology and to express regret for the libel

[392] The court noted that notwithstanding the following matters:

(a) an attempt by the plaintiff to resolve the matter without recourse to the court, as reflected in the plaintiff's letter before action dated 19 April 2007;

(b) the press statement by Tan Sri Muhyiddin Mohd Yassin, the then Honourable Minister for Agriculture and Agro-based Industry, and reported in the *Berita Minggu* two days later, that an Audit Committee appointed by the Ministry concluded that there were no wrong-doings in the awarding of contracts for the construction of a Complex for LKIM at Kampong Geluncur in Kuala Kedah (common bundle of documents 'B', at p 2);

(c) the absence of any investigation on the plaintiff by the ACA; and

(d) the press statement by Dato' Seri Haji Abdullah Ahmad Badawi, the then Right Honourable Prime Minister, that the allegations stemmed from domestic and personal differences between the plaintiff and the third defendant,

all the three defendants were not prepared to do anything to prevent further dissemination of this serious libel against the plaintiff. The three defendants

also refused to withdraw the libel, to express regret for making and publishing the baseless and unfounded statements and to apologise to the plaintiff.

[393] The court noted that the letter before action dated 19 April 2007 was issued by the plaintiff through his previous solicitors in order to achieve the following objects:

(a) to enable the defendants to correct and/or withdraw the false statements and to apologise to the plaintiff; and

(b) to vindicate the plaintiff's character.

[394] Based on the facts in and the circumstances surrounding the instant case, the court believed and accepted the plaintiff's evidence that the letter before action was not issued by the plaintiff with the intention or object on the part of the plaintiff of making money out of the baseless attack by the defendants on the plaintiff's good name.

Whether the words complained of are libellous of and concerning the plaintiff?

[395] In my judgment, this is a case of libel in relation to office and profession, all in one. It is trite law that any written or printed words which disparage a man in the way of his office and profession constitute a libel.

[396] In the instant case, it is actionable on the grounds that the words complained of impute to the plaintiff some quality detrimental to the successful carrying out of his office as the DG of LKIM at the material time and his profession as a administrative officer in the MADS.

[397] The words involve a reflection upon the personal character and the official and professional reputation of the plaintiff. They, therefore, give grounds for an action for libel (see *Ratcliffe v Evans* [1892] 2 QB 524, at p 529).

[398] It is libellous to impute to a man in any office any corrupt, dishonest, or fraudulent conduct, or any unfitness or want of ability to discharge his duties, and this is so whether the office is a public or a private one, or whether it is one of profit, honour, or trust. Thus, it has been held libellous to charge a vestry clerk with having misappropriated or misapplied the parish moneys (see *May v Brown* (1824) 3 B & C 113).

[399] Words which impute, as in the present case, to the plaintiff the commission of a crime which he can be made to suffer 'corporally by way of punishment' are actionable without proof of special damage (see *Webb v Beavan* (1883) 11 QBD 609, at p 610; *Hellwig v Mitchell* [1910] 1 KB 609, at p 614; and *Ormiston v Great Western Railway Company* [1917] 1 KB 598).

[400] So it is actionable to accuse a man of corruption for such an offence is corporally punishable (see *Purdy v Stacey* (1771) 5 Burr 2698 at p 417). A

[401] The exact offence need not be specified because words involving a general charge of criminality will suffice, provided they impute some offence for which the plaintiff can be made to suffer corporally by way of punishment (see *Webb v Beavan*). B

[402] It is not necessary that the words should have been intended to charge a crime; it is sufficient if it might reasonably have been understood as so doing (see *Marks v Samuel* [1904] 2 KB 287 at p 290; *E Hulton & Co v Jones* [1910] AC 20 which was followed in *Utusan Melayu (Malaysia) Bhd & 3 Ors v Tjanting Handicraft Sdn Bhd & Anor* [2005] 1 AMR 624 by the Kuala Lumpur High Court). C

Issue (5) between the plaintiff and the first and second defendants: Whether the first and second defendants can rely on the defences of qualified privilege? D

Issue (5) between the plaintiff and the third defendant: Whether the pleas of justification and qualified privilege and a defence of fair comment upon a matter of public interest are available to the third defendant? E

[403] The court shall now deal with issue (5) between the plaintiff and the first and second defendants and issue (5) between the plaintiff and the third defendant together, concerning the respective defences of the first and second defendants and the third defendant. F

[404] The court noted that whilst the first and second defendants attached their plea of qualified privilege under the aspect of public concern and interest, the third defendant attached his plea under a legal, moral and/or social duty. G

[405] It is trite law that he who asserts must prove. Hence, since it is the defendants who are relying on the defence of qualified privilege the defendants bear the burden of establishing the facts and circumstances necessary to create the privilege. H

[406] In my judgment, based on the evidence adduced by all parties before the court in the instant case, the defendants have failed in proving their defences of qualified privilege. I

[407] My reasons are as follows.

[408] It is trite law that to gain protection, the statement must be fairly warranted by the occasion, that is to say, it must be reasonably necessary for the performance of the duty or the protection of the interest which underlies the privilege.

[409] Most privilege occasions under the common law are classified broadly into one of two classes. The first is where the maker of the statement has a duty (whether legal or moral) to make the statement and the recipient has a corresponding interest (a simple example is the giving of an employment reference where the former employer is regarded as having a duty and the new employer obviously has an interest) to receive it. The second is where the maker of the statement is acting in pursuance of an interest of his (for example, informing workers of the fact that a fellow worker was dismissed for misconduct) and the recipient has such a corresponding interest or duty in relation to the statement or where the maker is acting in a manner in which he has a common interest with the recipient, for example, communication between shareholders or employees of a company about a takeover.

[410] There are two formulations in this area.

[411] They are as follows:

(a) in *Toogood v Spyring* (1834) 1 Cr M & R 181 at p 193, Parke B stated the law in the following terms:

> In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society.

(b) in *Adam v Ward* [1917] AC 309 at p 334, Lord Atkinson stated the law more briefly as follows:

> A privilege occasion is ... an occasion where the person who makes a communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

The position of the media

[412] Since the fundamental principle is that a statement is protected by privilege only if the publication of it is to persons who have a proper interest or duty in the matter with which it is concerned, the protection is rarely available for publication in the mass media, for the public as a whole will not have the relevant interest or duty (see *Aaron & Ors v Cheong Yip Seng & Ors* [1996] 1 SLR 623).

[413] Section 8 of the Defamation Act 1957 does not apply to publication to the public, or a section of the public, or a matter which is not of public concern and the publication of which is not for the public benefit. The section reads as follows:

> 8 Justification.
>
> In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

[414] The broad question which the court has to determine is whether it is necessary that the subject-matter of the report is of public concern or that its publication is for the public benefit, or whether both of these elements must be present to satisfy the requirements of the Defamation Act 1957.

[415] In *Kelly v O'Malley* (1889) 6 TLR 62; The Digest Vol 32(1) para 3349, it was held as follows:

> the publication must be for the public benefit besides being of public interest.

[416] At p 64, Huddleston B observed that if a newspaper chooses to publish defamatory matter about anybody, though actually uttered at a public meeting but which has nothing to do with the objects of the meeting, then it cannot shield itself behind the Law of Libel Amendment Act 1888.

[417] Applying the accepted legal principles laid down and/or applied in the cases refered to above, in particular, that it is a well established rule that some duty or interest must exist in the party to whom the communication is made as well as in the party making it, the burden was on the defendants in the instant case to prove as follows:

(a) that some duty or interest exist in the readers of *Harian Metro* as well as some interest or duty exists in the first, second and in the third defendants;

(b) that the readers of the *Harian Metro* and the defendants share that common interest; and

(c) that there was a duty or interest on one side, and a duty or interest, or interest or duty (whether common or corresponding or not) on the other.

[418] In the instant case, the public have no interest in matters reported to the ACA unless the reports have been duly investigated and the culprits duly charged in the courts.

[419] In all cases in which the defendant relies on a plea of qualified privilege, whether on ground of duty or of interest, such duty or interest must exist in fact. The evidence from the third defendant and the first and second defendants and their witnesses including Dato' Mustafa bin Ahmad ('DW5') are enough to show that such a duty or corresponding interest or vice versa did not exist.

[420] Therefore, in my judgment, the defendants in the instant case have failed to satisfy the above principle. Hence, they have failed to prove their defences of qualified privilege and fair comment on matters of public interest.

Charges

[421] The court shall now deal with the main charges in the impugned article captioned 'Probe into LKIM contracts Board of Directors report to the ACA' which has reported, inter alia, as follows:

> Suspicion over awards of contract and construction works on Lembaga Kemajuan Ikan Malaqysia (LKIM) Complex in Kuala Kedah, Kedah worth approximately RM55 million compelled the agency's Board of Directors itself to lodge a complaint with the Anti-Corruption Agency (ACA).

[422] If the libel is contained in a newspaper, not only the paragraph but also the heading must be taken into account. Words in themselves apparently innocent may be shown to have a defamatory meaning when they are read with reference to the circumstances in which they were written and with reference to the context in which they appear.

[423] There is no doubt that the ordinary and natural meaning of the words 'The construction of Kuala Kedah LKIM Complex to ACA' is as follows:

(a) a report on the construction of Kuala Kedah LKIM Complex has been lodged with the ACA relating to the commission of an offence under the Anti-Corruption Act 1997 ('the Act');

(b) this report has been entered into the book of the ACA;

(c) this report shall be kept secret and shall not be disclosed until the accused has been charged in court for an offence under the Act; and

(d) the accused was under investigation by the ACA as a result of the report.

[424] As it was lodged by the Board of Directors of LKIM, the report must be authentic. Being a suspicious award and not made in accordance with contract award procedures, an offence under the Act has been detected and a crime has been committed by the plaintiff who stands accused of the charges by the third defendant made to the ACA in his official capacity as the Chairman of LKIM on behalf of LKIM and the first and second defendants have reported the same charges in the impugned article.

[425] Words which impute to the plaintiff the commission of a crime for which to suffer 'corporally by way of punishment' are actionable without proof of special damages (see *Hellwig v Mitchell* [1910] 1 KB 609).

[426] In *Hellwig v Mitchell*, Bray J said as follows at p 613:

> words imputing that the plaintiff has rendered himself liable to the mere infliction of fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally.

[427] With regard to the following words complained of:

> ... the fee of RM100 per cubic metre of sand dug was in excess of the rate valued at RM30 by the Public Works Department (PWD).

[428] The ordinary and natural meaning of the words is as follows.

[429] An excess of RM70 per cubic metre in the contract entails an offence in accepting gratification under s 10 of the Anti-Corruption Act 1997, to wit, corruptly solicits or receives or agrees to receive for himself gratification as a reward.

Other charges are as follows:

(a) 'the complex buildings ... completed ... at the cost of RM29 million cannot be used';

(b) 'the same company is said to have been awarded a contract'; and

(c) contract worth RM17.8m to build an access road of 1.8km to the complex and is also said that the value of the contract was also far and much higher.

[430] Those are imputations of guilt of misappropriation of funds, an abuse of power and corruption, respectively, and they are all criminal offences under the Penal Code and the Anti-Corruption Act 1997.

[431] The exact offence need not be specified; words involving a general charge of criminality will suffice, provided they impute some offence for which the plaintiff can be made to suffer corporally by way of punishment (see *Webb v Beavan* (1883) 11 QBD 609).

[432] Another charge is as follows:

> ... purchased a building for RM4.45 million ... when the authority already had its own head office.

[433] To purchase a building which was not needed by LKIM and at a steep price could be an offence under s 12(1) of the Anti-Corruption Act 1997, to wit, corruptly accepting, obtaining or agreeing to accept gratification as a reward for doing an act in favour of a person in relation to his principal's affairs.

[434] The crime imputed need not be indictable; it sufficient if it is triable summarily (see *Webb v Beavan* (1883) 11 QBD 609 per Lopes J at p 610).

[435] It is not necessary that the words should have been intended by the speaker to charge a crime; it is sufficient if the hearers might reasonably have understood them as so doing.

[436] In *Marks v Samuel* [1904] 2 KB 287 at p 290, Vaugham Williams J said as follows:

> It is not a case in which there is any imputation of professional misconduct or misconduct by a tradesman in his trade or anything of that sort. It is just one of those cases in which spoken words are not actionable unless they are spoken words which impute or might impute a crime, that is to say, words which in the opinion of the tribunal which ultimately deals with the matter, appear to have been not necessarily intended by the speaker to impute a crime, but capable of being understood by the hearers as imputing a crime.

[437] To say or impute that a report on the construction of the Kuala Kedah LKIM (of which the plaintiff was its principal officer) Complex was before the ACA, the award of the contract was suspicious and not in accordance with contract award procedures, and the contract was awarded to a company wrongfully by way of direct negotiations, the management under the plaintiff went over the head of the Lembaga ie the third defendant, and misappropriated government expenditure in giving contracts at astronomical rates for

gratification, to mention a few is to affect the plaintiff adversely in the estimation of reasonable people generally.

[438] The heading of the impugned article alone exposes the plaintiff to ridicule and contempt. The impugned article as a whole has a tendency to injure him in his office and profession. The statements are false about the plaintiff to his discredit.

The third defendant's plea of justification

[439] The third defendant raised a plea of justification in his defence in order to justify the publication of the words complained of.

[440] With regard to the third defendant's plea of justification the law is trite.

[441] It is as follows:

(a) the rule of pleading is that before pleading justification, a defendant should ensure that he has satisfied the following criteria:

(i) he believes that the words complained of are true;

(ii) he intends to support the defence at trial; and

(iii) he has reasonable evidence to support the plea or he has reasonable grounds to suppose that sufficient evidence to prove that the allegations are true in substance and in fact will be available at trial (see *McDonald's Corp and another v Steel and another* [1995] 3 All ER 615).

[442] In my judgment, based on the circumstances of the instant case and on the evidence adduced at the trial by the third defendant, the third defendant failed to comply with this rule.

[443] My reasons are as follows.

[444] The plaintiff has succeeded in establishing a prima facie cause of action as soon as he has established the publication of defamatory words. It is no part of the plaintiff's case in an action for defamation to prove that the words are false, for the law presumes this in his favour (see *Belt v Lawes* (1882) 51 LJQB 359 at p 361).

[445] To establish a plea of justification, a defendant must do the following:

(a) prove that the defamatory imputation is true (see *Peters v Bradlaugh* (1888) 4 TLR 414);

(b) prove as a fact that the plaintiff did commit the offence;

(c) justify the precise defamatory imputation complained of (see *Fysh v Thorowgood* (1598) Cro Eliz 623; and *Wernher, Beit & Co v Markham* (1901) 18 TLR 143);

(d) prove the truth of all the material defamatory statements in the libel as there must be a substantial justification of the whole libel (see *Johns v Gittings* (1591) Cro Eliz 239); and

(e) justify the precise defamatory words as set out in the statement of claim (see *Heap v Green* [1926] NZLR 302).

[446] In *Heap v Green*, the court held that a plea that 'such words as may be admitted or proved to have been used by the defendant are true in substance and in fact' was a bad plea.

[447] In my considered view, in the instant case, the third defendant is not entitled to set out his own version of the words and then plead that those words were true at the material time (see *Rassam v Budge* [1893] 1 QB 571 (CA)).

[448] In my considered view, in the instant case, since the defamatory allegation is a specific one – namely an abuse of power – the plea of justification is not particularised sufficiently. The plaintiff is entitled to know with certainty on what the defendants intend to rely in support of his plea. Indeed, it has been said that the justification ought to state the facts with as much particularity as in an indictment (see *Marks and Another v Wilson-Boyd and Others* [1939] 2 All ER 605).

[449] In particularising his plea of justification, the third defendant failed to confine himself strictly to the issues necessary for a fair determination of the dispute between the parties (see *Polly Peck (Holdings) Plc and others v Trelford and others* [1986] 2 WLR 845; [1986] QB 1000 at p 1021).

[450] Instead of confining himself strictly to the issues, the particulars are occasioned by prolixity thereby acting oppressively against the plaintiff (see *Polly Peck (Holdings) Plc and others v Trelford and others* [1986] 2 WLR 845; [1986] QB 1000 at p 1032).

[451] Until sufficient particulars of the plea of justification are given, the issues in the action are not defined (see *Godman v Times Publishing Company, Limited* [1926] 2 KB 273 at p 288).

[452] On the effect of a general plea of justification without particulars of that justification Lord Esher MR held as follows in *Zierenberg and Wife v*

Labouchere [1893] 2 QB 183 at p 186:

> That a general plea of justification of a libel without particulars of that justification is bad from the earliest times.

[453] In my considered view, s 8 of the Defamation Act 1957 is not applicable in the instant case because of the following reasons:

(a) the words complained of were published out of context and given undue prominence;

(b) the plea of justification is not brought enough to cover every injurious imputation in the libel and in particular it does not cover comments in so far as they contain statements or inferences of the defamatory character; and

(c) the plea of justification does not set out the facts relied upon in support thereof and in the premises the third defendant has failed to comply with the rule.

Whether the publication of the report by the third defendant to Wan Hazmir Bakar is protected by ancillary privilege?

[454] In my judgment, even assuming that the third defendant's report to the ACA is an absolutely privileged document, the publication of the report by the third defendant to Wan Hazmir Bakar is not protected by ancillary privilege.

[455] In my view, this much is clear from my reading of the judgment of Mohamad Zahir J in *Clarence Wilfred v Tengku Adnan Tengku Mahmud & Anor* [1983] CLJ (Rep) 518 ('*Clarence Wilfred*'s case) and the judgment of Prasad Sandosham Abraham JC (now JCA) in *Tan Sri Dato' Seri Musa bin Dato' Hj Hassan v Dato' Seri Anwar Ibrahim* [2010] MLJU 934; [2010] 8 CLJ 239 ('*Tan Sri Dato' Seri Musa Dato' Haji Hassan*'s case').

[456] In *Clarence Wilfred*'s case, the plaintiff sued the first defendant who was the principal of the college ie the second defendant, in which the plaintiff was a lecturer. The first defendant wrote some letters to the plaintiff which the plaintiff claimed were defamatory of him. The defendants pleaded that the letters which contained the words complained of were written on an occasion of qualified privilege and that its incidental publication to the typist and office boy was also privileged and did not constitute publication.

[457] According to the defendants, the letters were directed personally to the plaintiff and the act of the typist in typing out the letters and the act of the office boy in dispatching the letters to the plaintiff were acts done in the

ordinary course of business and the acts were also reasonable and were the usual course of action adopted by the first defendant in the circumstances.

[458] The learned judge held that the first defendant and second defendant's defence of qualified privilege succeeded and he dismissed the plaintiff's claim against them for damages for defamation.

[459] Reverting back to the instant case, the court noted that the defendants have placed heavy reliance on the reported decisions of Prasad Abraham (now JCA) in the *Berita Harian* case, namely, *Dato' Annas bin Khatib Jaafar v Datuk Manja Ismail & Ors* [2011] 8 MLJ 747 (which was affirmed by the Court of Appeal on 25 March 2013) and Hamid Sultan Abu Backer J (now JCA) in *The News Straits Times* case, namely, *Dato' Annas bin Khatib Jaafar v The New Straits Times Press (M) Bhd & Ors* [2013] 10 MLJ 640; [2013] 4 CLJ 96 (which was affirmed by the Court of Appeal on 11 October 2013).

[460] This court noted as follows:

(a) in the *Berita Harian* case, the plaintiff sued Datuk Manja Ismail, The New Straits Times Press (M) Bhd, Wan Hazmir Bakar and Adam Abdul Hamid for damages for defamation for the publication of an impugned article in the *Berita Harian* newspaper;

(b) in the *Berita Harian* case, the learned judge held in favour of the defendants and dismissed the plaintiff's claim on the ground, inter alia, that the impugned article in the *Berita Harian* newspaper ('the BH report') was protected by the defendant's defence of qualified privilege because the defendants had practised responsible journalism as long as the defendants advanced matters of public interest within the confines of responsible journalism, and hence, they were guaranteed the freedom of speech as enshirined under art 10 of the Federal Constitution. According to the learned judge, this approach was consonant with the aspirations of modern society for transparency and accountability whilst protecting against blatant maligning of the reputation of individuals;

(c) at p 755, the learned judge said as follows:

> [16] In the event the court is held to be wrong in finding that the plaintiff had not made up a case for defamation, then the court has to look at the defence of qualified privilege through the concept of 'responsible journalism' which gives a certain degree of latitude surrounding newspaper publications not available previously. It is a question of the rights of the plaintiff to the protection of his own reputation as opposed to the freedom of expression and the role of the media in modern society.

(d) at p 759, the learned judge said as follows:

> [21] It is the view of this court that so long as the defendant advanced matters

of public interest within the confines of responsible journalism, they will always be in a position to enjoin the court to declare the reassertion of the guarantee to the freedom of speech enshrined under art 10 of the Federal Constitution. This approach would be consonant with the aspirations of modern society for transparency and accountability whilst protecting against blatant maligning of the reputation of individuals.

(e) in *The New Straits Times* case, the plaintiff sued The News Straits Times Press (M) Bhd, Datuk Hishamuddin Aun, Farrah Naz Karim and Adam Abdul Hamid for damages for defamation for the publication of an impugned article in *The News Straits Times* newspaper;

(f) in *The News Straits Times* case, the learned judge held that the impugned article in *The New Straits Times* newspaper ('the NST report') is protected by absolute privilege in an ancillary manner because, firstly, the NST report regurgitated, substantially, the contents of the third defendant's report to the ACA; secondly, it is akin to a police report which has been held by Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal in *Abdul Manaf bin Ahmad v Mohd Kamil Datuk Haji Mohd Kassim* [2011] 4 MLJ 346; [2009] 2 CLJ 121 to be absolutely privileged; thirdly, no action may lie in respect of it, and hence, any action in respect of the NST report is bound to fail;

(g) at pp 648 and 649 (MLJ); pp 105 and 106 (CLJ), the learned judge said as follows:

[5] ...

...

(v) Additionally, the contents of the NST report are substantially a regurgitation of the letter of complaint/report to the ACA. An ACA report calling for an investigation, it is asserted is akin to a police report. The contents of the NST report raises serious issues of public interest, to wit the allegations of mismanagement and impropriety in LKIM, a government agency/statutory body over the awarding of a contract to build a multimillion ringgit complex and calls for an investigation into the same.

(w) Police reports have been held by the Court of Appeal in *Abdul Manaf bin Ahmad v Mohd Kamil Datuk Haji Mohd Kassim* [2011] 4 MLJ 346; [2009] 2 CLJ 121 as being absolutely privileged and no action may lie in respect of it.

(x) Likewise, it is asserted that ACA reports are akin to police reports in that they both call for an investigation into suspected acts of criminal wrong-doing (corruption), and as such would also be protected by absolute privilege. In the instant case, the NST report, as mentioned earlier, regurgitated substantially the contents of the ACA report concerned. *As such the protection of absolute privilege surrounding the ACA report would also attach to the NST report in an ancillary manner granting it absolute privilege status as well. In the result, any action in respect of the NST report is bound to fail.*

A (y) In all the circumstances, this is an appropriate case to be struck out as being an abuse of process. (Emphasis added).

(h) the two different panels of the Court of Appeal judges who heard the two appeals by the plaintiff against the decisions of the two learned B judges in the two cases mentioned above did not give their grounds of judgment when affirming their decisions;

(i) hence, this court does not know whether the Court of Appeal in *The New Straits Times* case had upheld the ruling of the learned judge in the C High Court that the NST report is protected by absolute privilege in an ancillary manner based on the reasons given by the learned judge. If that was one of the grounds of the decision of the learned judges of the Court of Appeal then this court is bound by that decision based on the doctrine of stare decisis;

D (j) if that was not one of the grounds of the decision of the learned judges of the Court of Appeal then this court is at liberty to disagree with the ruling of the learned judge in *The New Straits Times* case based on the following reasons:

E (i) this court noted that the learned judge in *The New Straits Times* case did not cite any authority to support his proposition of law that the NST report is protected by absolute privilege in an ancillary manner;

F (ii) this court noted that the learned judge in *Tan Sri Dato' Seri Musa Dato' Haji Hassan*'s case cited *Clarence Wilfred*'s case as an authority on ancillary privilege of the incidental publication of the letters alleged to be defamatory of the plaintiff by the first defendant to the typist and office boy;

G (iii) this court also noted that the learned judge in *Tan Sri Dato' Seri Musa Dato' Haji Hassan*'s case also cited the case of *Taylor and others v Serious Fraud Office and others* [1998] 4 All ER 801 and the following observations of Lord Hoffman at p 813 in that case which were reproduced at pp 242H and 243F of the judgment of H the learned judge in *Tan Sri Dato' Seri Musa Dato' Haji Hassan*'s case:

> In *Mann v O'Neill* [1997] 71 ALJR 903 at p 907 the judgment of Brennan CJ, Dawson, Toohey and Gaudron JJ describes the rationale as one of necessity:
>
> I It may be that the various categories of absolute privilege are all properly to be seen as grounded in necessity, and not on broader grounds of public policy. Whether or not that is so, the general rule is that the extension of absolute privilege is 'viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated'. Certainly,

absolute privilege should not be extended to statements which are said to be analogous to statements in judicial proceedings unless there is demonstrated some necessity of the kind that dictates that judicial proceedings are absolutely privileged.

Thus the test is a strict one; necessity must be shown, but the decision on whether immunity is necessary for the administration of justice must have regard to the cases in which immunity has been held necessary in the past, so as to form part of a coherent principle.

Approaching the matter on this basis, I find it impossible to identify any rational principle which would confine the immunity for out of court statements to persons who are subsequently called as witnesses. *The policy of the immunity is to enable people to speak freely without fear of being sued, whether successfully or not. If this object is to be achieved, the person in question must know at the time he speaks whether or not the immunity will attach.* If it depends upon the contingencies of whether he will be called as a witness, the value of the immunity is destroyed. At the time of the investigation it is often unclear whether any crime has been committed at all. *Persons assisting the police with their inquiries may not be able to give any admissible evidence; for example, their information may be hearsay, but none the less valuable for the purposes of the investigation. But the proper administration of justice requires that such people should have the same inducement to speak freely as those whose information subsequently forms the basis of evidence at a trial.*

(Emphasis added).

[461] Reverting back to the instant case, the court was not satisfied that based on the facts and circumstances of the instant case and the evidence before the court the three defendants have passed the strict test enunciated in the English case so as to enable them to say that the interest of justice and necessity in the instant case require the protection of absolute privilege to be extended to the publication of the fact of the making of the report by the third defendant to the ACA, the publication of the contents of the third defendant's report to Wan Hazmir Bakar at the office of the second defendant and the handing over of a copy of the third defendant's report to the second defendant's Wan Hazmir Bakar at the office of the second defendant.

[462] In fact, in my respectful view, Lord Hoffman in the English case had held as follows in the English case:

I therefore agree with the test proposed by Drake J in *Evans v London Hospital Medical College (University of London)* [1981] 1 WLR 184, 192:

… the protection exists only where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or a possible prosecution in respect of the matter being investigated.

This formulation excludes statements which are wholly extraneous to the investigation –

irrelevant and gratuitous libels – but applies equally to statements made by persons assisting the inquiry to investigators and by investigators to those persons or to each other.

(Emphasis added).

[463] In the instant case, based on the facts and circumstances, the evidence before the court and the reasons given by the court in this judgment, the court was satisfied that there was blatant maligning of the plaintiff by all the three defendants.

Issue (6): Whether the primary remedy of defamation by way of an award of damages is available to the plaintiff?

[464] The court shall now deal with issue (6) which is common to the plaintiff and all the three defendants.

[465] It is trite law that the purpose of an award of general damages is to compensate the plaintiff for the effects of the defamatory statement. Damages under this heading are awarded on a desire to mark the court's sense of the defendant's conduct. General damages serve three functions. Firstly, they act as a consolation to the claimant for the distress he suffers from the publication of the defamatory statement. Secondly, they serve to repair the harm to his reputation. Thirdly, they serve as a vindication of his reputation (see *Gatley on Libel and Slander*, Sweet & Maxwell, (11th Ed), 2008).

[466] In the instant case, before making the award of a sum of RM30,000 as damages against the first and second defendants and a sum of RM10,000 as damages against the third defendant in favour of the plaintiff, the court took into consideration the following factors:

(a) the conduct of the plaintiff (see *Kelly v Sherlock* (1866) LR 1 QB 686 per Blackburn J). There is evidence that the plaintiff was asked by the second defendant's Wan Hazmir Bakar for his (the plaintiff's comment) on the report that was lodged by the third defendant to the ACA before the publication of the impugned article but the plaintiff opted not to give any comment to Wan Hazmir Bakar;

(b) the plaintiff's position and standing, the nature of the libel (see *Simpson v Robinson* (1848) 12 QB 511 at p 513; The Digest Vol 32(1) para 3706 per Denman CJ). The illustrious career of the plaintiff as a career administrator in the MADS prior to his appointment as the DG of LKIM at the material time and the fact that as the DG of the LKIM he was a well known personality to all the fishermen who were members of the State Fishermen Associations and the Federal Fishermen Association and to his colleagues and contemporaries in the MADS;

(c) the mode and extent of the publication, the absence of any retraction or apology by the defendants (see *Vines, Gent v Serell* (1835) 7 Car & P 163; The Digest Vol 32(1) para 4187 per Park J);

(d) the conduct of the defendants before action, after action, and in court at the trial of the action;

(e) before action, the second defendant's Kamarulzaman Pid had contacted the plaintiff on the same day the impugned article was published ie 10 April 2007, to obtain his comments. The plaintiff informed him that the allegations contained in the third defendant's report was motivated by malice and was without any basis. The plaintiff then went on to provide his side of the story to Kamarulzaman Pid. This caused the second defendant to, immediately, on the following day ie 11 April 2007, caused to be written, printed and published on p 22 of *Harian Metro* an article captioned 'Dakwaan Tidak Berasas' in Malay or 'Allegations Without Basis' in English which contained, inter alia, the gist of the plaintiff's side of the story and his response that the report to the ACA was motivated by malice and without any basis; and

(f) as for the third defendant, the third defendant had admitted during the trial, in cross-examination, that the allegations against the plaintiff of mismanagement of government funds leading to wastage of government funds, of improper and corrupt practices and of abuse of power by a career administrator in the MADS in his capacity as the DG of LKIM were false.

[467] In *Praed v Graham* (1889) 24 QBD 53, Lord Esher MR said as follows at p 55 concerning the conduct of the defendant which may be taken into consideration by the court in assessing the amount of damages to be awarded to a plaintiff in a libel action:

> the whole conduct of the defendant from the time the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in Court at the trial of the action.

[468] In making the award of damages in favour of the plaintiff, the court agreed with and accepted the submissions of the plaintiff that in the instant case general damages ought to be awarded against the defendants for the libel published in a newspaper that was distributed both nation-wide and throughout the world at every embassy, consulate, high commission and trade attach[e92077]here the plaintiff's peers are likely to be stationed.

[469] As Best CJ said in *Sir W De Crespigny v Wellesley* (1829) 5 Bing 392 at para 402 as follows:

> Publication in a newspaper may –

> circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition of oral slander. In the latter case, what has been said is known only to a few persons and if the statement be untrue, the imputation cast upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser and the previous character of the accused will be properly estimated. But if the report is to be spread over the world by means of the Press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase and which it might be different, if not impossible, ever completely to remove.

[470] In *Ratcliffe v Evans* [1892] 2 QB 524, the court held that in cases of libel the law presumes that some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation.

[471] At p 528, Bowen LJ said as follows:

> the law presumes that some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation.

[472] In *English and Scottish Co-Operative Properties Mortage and Investment Society, Limited v Odhams Press, Limited* [1940] 1 KB 440, the court held that in cases where there is a serious libel wrought upon the plaintiffs, the plaintiffs are not obliged to show that they have suffered actual damage. The reason is because the law assumes that they have suffered damage and, therefore, they are entitled to substantial damages.

[473] At p 461, Lord Goddard LJ said as follows:

> There is no obligation on the plaintiffs to show that they have suffered actual damage ... In every case (a plaintiff) is entitled to say that there has been a serious libel upon him, that the law assumes he must have suffered damage, and that he is entitled to substantial damages ...

Issue (7): Whether the plaintiff is entitled to claim aggravated and/or exemplary damages?

[474] The court shall now deal with issue (7) as it is common between the plaintiff and all the three defendants.

[475] In my judgment, issue (7) ought to be decided in the negative in favour of all the three defendants. In my judgment, the plaintiff is not entitled to claim aggravated and/or exemplary damages against all the three defendants.

[476] It is trite law that aggravated damages are the courts' estimate of the sum necessary to take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. This is because there may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride (see *Gatley on Libel and Slander*, Sweet & Maxwell, (11th Ed), 2008).

[477] The extent of publication is very relevant to damages (see *Gathercole v Miall* (1846) 15 M & W 319).

[478] In that case Parke J stated as follows:

> surely the proprietor of a newspaper, with a very large circulation, is to be visited with larger damages for a libel published in it than one of a more limited circulation.

[479] The court can also take into consideration the distress, hurt and humiliation that the defamatory publication has caused to the plaintiff.

[480] In *John v MGN Ltd* [1996] 3 WLR 593, Sir Thomas Bingham MR held, inter alia, as follows:

> The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. *In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that libellous publication took place. It is well established that compensory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examine the plaintiff in a wounding or insulting way.* (Emphasis added.)

[481] As stated earlier in this judgment, the plaintiff has pleaded in sub-para 11.5 of his SOC that the court would be asked to infer that the defendants published the said words with the knowledge that they were libellous and/or with reckless disregard as to whether or not they were libellous and after having established that the prospect of material advantage to themselves by reason of their publication outweighed the prospect of material loss.

[482] At the end of the assessment of damages and costs, the plaintiff has submitted that the court ought to award to the plaintiff exemplary damages on the ground that there is evidence that the defendants knew that what they proposed to publish was defamatory and untrue and as long as they could rely on the report, the truth could be inferred.

[483] The plaintiff has relied on the following reasons to support his submissions for an award of exemplary damages in favour of the plaintiff:

(a) the first and second defendants had insisted that no verification was made with the plaintiff before they published the impugned article. What the first and second defendants did was only to ask the plaintiff for his comments. The defendants, however, made a verification with the ACA to satisfy themselves that the report in the Common Bundle 'B' was indeed lodged by the person before them in the third defendant, namely, Adam Abdul Hamid, the person whom they believed to be very reliable judging from his position as a chairman of an organisation ie the Chairman of LKIM; and

(b) given that there was a verification from the ACA, the verification was off at a tangent when the subject matter of the impugned article was the contents of the third defendant's report to the ACA and not the physical existence of the third defendant's report to the ACA.

[484] It is trite law that exemplary damages are intended to punish the defendant for the willful commission of a tort or to teach him that tort does not pay. They are not, even in an attenuated sense, concerned with compensation for the plaintiff (see *Gatley on Libel and Slandar*, Sweet & Maxwell, 11th Ed, 2008, para 9.16).

[485] In *Casell & Co Ltd v Broome and Another* [1972] AC 1027 at p 1089, Lord Reid said as follows:

> The difference between compensatory and punitive damages is that in assessing the former the jury ... must consider how much the plaintiff ought to receive, whereas in the latter they must consider how much the defendant ought to pay.

[486] It is also trite law that where there is evidence that the editor, printer and owner of a newspaper knew that what they proposed to publish was defamatory and untrue, or that they were reckless, not caring whether the publication was true or false; and that they decided to publish because the prospect of material advantage outweighed the prospects of material loss they ought to be held liable for exemplary damages (see *Rookes v Barnard and others* [1964] AC 1129, per Lord Devlin at p 1228).

[487] Evidence that a newspaper failed to check a story could be sufficient to found a case of recklessness.

[488] In *John v MGN Ltd*, on the question whether the case of recklessness was in fact made out the Master of Rolls observed as follows at p 623:

> It seems to us that the evidence did meet this test for a number of reasons. First, the newspaper itself, for the reasons already noted, regarded such an inquiry as a requisite; secondly, the inquiry was extremely simple, involving no more than a telephone call to Mr Reid's home or office in Los Angeles, which the newspaper could easily have instructed Mr Brenna to make; thirdly, there was no urgency about the article, which was not news which would lose all interest if it was deferred a week or more to the next or subsequent issue of the 'Sunday Mirror;' *fourthly, it was an obviously damaging story about an extremely well known public figure. In such circumstances the total failure to check was in our judgment so crass as to be capable of constituting recklessness.* (Emphasis added.)

[489] Evidence of matters tending to establish malice on the part of the defendant is as a general rule admissible to support a claim for exemplary damages.

[490] Until *Rookes v Barnard and others* [1964] AC 1129, exemplary damages were no clearly differentiated from aggravated damages but that case restricted them to a situation where the defendant's tortious act has been done 'with guilty knowledge, for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical penalty' (see Lord Hailsham of Marylebone LC's judgment in *Casell & Co Ltd v Broome and another* [1972] AC 1027 at 1079 in which he had explained that Lord Devlin's formulation in *Rookes v Barnard and Others* [1964] AC 1129 at p 1227 that 'where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrong doing will probably exceed the damages at risk' as being not exhaustive but merely illustrative of the principle that a wrongdoer should be taught that tort does not pay.

[491] On the issue concerning the defendant's state of mind in relation to the statement, it is trite that the defendant may of course have the intention of committing the tort of defamation but this is not necessary because evidence of recklessness is sufficient (see *Casell & Co Ltd v Broome and another* [1972] AC 1027 at pp 1079, 1094, 1130 and 1133).

[492] Recklessness here has a meaning analogous to that of the mental element of deceit (see *William Derry, JC Wakefield, MM Moore, J Pethick and SJ Wilde v Sir Henry William Peek, Baronet* (1889) 14 App Cas 337 at p 374 per Lord Herschell).

[493] That is to say, the statement must be made without belief in its truth.

[494] In *John v MGN Ltd* [1996] 3 WLR 593, the court said as follows at p 618:

> The publisher must have suspected that the words were untrue and have deliberately refrained from taking obvious steps which if taken, would have turned suspicion into certainty:

[495] Nevertheless, in my judgment, the issue ought to be decided in the negative in favour of the defendants. In my judgment, the plaintiff is not entitled to an award of aggravated and/or exemplary damages against the three defendants.

[496] My reasons are as follows.

[497] There is no evidence adduced by the plaintiff that the first and second defendants have derived substantial material advantage by way of increased sales as a result of the publication of the impugned article.

[498] With regard to the third defendant, he had testified in cross-examination, that he had in truth lodged the report to the ACA in his private or personal capacity and not on behalf of the Board of Directors of LKIM.

WHAT IS THE QUANTUM OF COSTS WHICH OUGHT TO BE AWARDED TO THE PLAINTIFF IN THE INSTANT CASE?

[499] In the instant case, the court awarded a sum of RM40,000 as costs against the first and second defendants and a sum of RM30,000 as costs against the third defendant.

[500] My reasons are as follows.

[501] In respect of the quantum of costs awarded to the plaintiff against the first and second defendants, the plaintiff's learned counsel had asked for a sum of RM100,000 against all the three defendants. Nevertheless, the court agreed with and accepted the submissions of learned counsel for the first and second defendants that a lesser sum ought to be awarded to the plaintiff. This is because as stated earlier in this judgment, all in all, the plaintiff had commenced three suits against the first and second defendants in respect of three impugned articles which were published in three newspapers belonging to the second defendant ie the *New Straits Times* newspaper, the *Berita Harian* newspaper and the *Harian Metro* newspaper.

[502] Two of the suits were dismissed by the High Court and the decisions of the High Court were upheld on appeal by the Court of Appeal. In two of the three suits, the same witnesses were called and the pleadings filed by the plaintiff and the first and second defendants were the same. Learned counsel who acted for the plaintiff and learned counsel who acted for the first and second defendants were the same.

[503] Furthermore, no witnesses were called by the plaintiff in the hearing for the assessment of the damages. Hence, the court awarded to the plaintiff a sum of RM40,000 as costs against the first and second defendants which the court felt was a fair and reasonable amount.

[504] In respect of the third defendant, the court was of the considered view that a sum of RM30,000 was a fair and reasonable amount of costs to be awarded to the plaintiff based on the amount of work which the plaintiff's learned counsel had to do in respect of the plaintiff's claim against the third defendant.

[505] In *Robert v Jones* [1891] 2 QB 194, Hawkins LJ said as follows at p 194 on the principle of law to be applied in assessing the amount of costs to be awarded to the plaintiff:

> It is the duty of the judge who tried the case ... to consider the whole circumstances of the case, everything which led to the action, everything which led to the libel, everything in the conduct of the parties.

[506] Order 59 of the Rules of Court 2012 deals with costs.

[507] Order 59 r 3(1) provides that no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the court unless there are provisions in O 59 which provide otherwise.

[508] Order 59 r 3(2) provides that the general rule is that the costs shall follow the event.

[509] Order 59 r 3 reads as follows:

> 3 When costs to follow the event (O 59 r 3)
>
> (1) Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the Court.
>
> (2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to

this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

[510] Order 59 r 16(1) provides that in assessing the costs payable in relation to any item, the court shall have regard to all relevant circumstances, and in particular, to seven factors specified therein.

[511] The rule reads as follows:

16 Basis of assessment (O 59 r 16)

(1) In assessing the costs payable in relation to any item, the Court shall have regard to all relevant circumstances, and in particular to –

(a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b) the skill, specialized knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel;

(c) the number and importance of the documents, however brief, prepared or perused;

(d) the place and circumstances in which the business involved is transacted;

(e) the importance of the cause or matter to the client;

(f) where money or property is involved, its amount or value;

(g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.

[512] Order 59 r 19(1) provides that the amount of costs (excluding disbursement) that are payable shall be at the discretion of the court and shall be determined upon the conclusion of the trial.

[513] Order 59 r 19(2) provides r 16 that in fixing the costs payable, the court shall have regard to the relevant circumstances including but not limited to the factors set out in.

[514] Order 59 r 19 reads as follows:

19 Costs payable for trial in the High Court (O 59 r 19)

(1) The amount of costs (excluding disbursement) that are payable shall be at the discretion of the Court and shall be determined upon the conclusion of the trial.

(2) In fixing the costs payable, the Court shall have regard to the relevant circumstances including but not limited to the factors set out in the rule 16.

[515] In *Scherer and Another v Counting Instruments Ltd and Another* [1986] 1 WLR 615 at pp 621–622 Buckley LJ held that an award for the amount of costs is to be made based on the justice of the case.

[516] In making the two awards of costs the court took into consideration the following matters:

(a) the whole circumstances of the case;

(b) everything which led to the action;

(c) everything which led to the libel; and

(d) everything in the conduct of the parties.

CONCLUSION

[517] In the premises and based on the reasons as set out above, the court granted to the plaintiff judgment on liability for damages for libel against the three defendants and the court awarded to the plaintiff a sum of RM30,000 as general damages for libel and a sum of RM40,000 as costs against the first and second defendants and a sum of RM 10,000 as general damages for libel and a sum of RM30,000 as costs against the third defendant.

Claim allowed.

Reported by Afiq Mohamad